

# **FAQs**

FREQUENTLY ASKED QUESTIONS  
ABOUT

**AT&T'S ACQUISITION  
OF  
MEDIAONE,  
OPEN ACCESS,  
AND  
THE PUBLIC INTEREST**

CS Docket No. 99-251

September 17, 1999

## TABLE OF CONTENTS

1	THE OVERVIEW: WHAT IS THE AT&T/MEDIAONE MERGER REALLY ALL ABOUT? <i>Search Term: MA WEB</i> .....	1
2	WHY SHOULD THE FCC BE ANY MORE CONCERNED IN THIS MERGER ABOUT THESE ISSUES THAN IT WAS IN THE AT&T/TCI MERGER? <i>Search Term: "NO REGULATORY HURDLES"</i> .....	6
3	DOESN'T THIS MERGER OFFER SUBSTANTIAL PUBLIC INTEREST BENEFITS? <i>Search Term: "TRUST US"</i> .....	8
4	HOW WOULD THIS MERGER AFFECT ACTUAL OR POTENTIAL COMPETITION THAT THE INTERNET POSES TO TRADITIONAL CABLE SERVICES? <i>Search Term: PRESERVING THE VIDEO CHOKE-POINT</i> .....	11
5	HOW WOULD THIS MERGER AFFECT COMPETITION – BEYOND CABLE'S CORE VIDEO MARKET – IN NEW GENERATION COMMUNICATION SERVICES? <i>Search Term: HEGEMONY</i> .....	13
6	WOULD THIS MERGER REALLY HARM CONSUMERS? <i>Search Term: COMPETITION WITHERS</i> .....	19
7	WHY IS OPEN ACCESS THE BEST REMEDY? <i>Search Term: OUNCE OF PREVENTION</i> .....	21
8	HASN'T AT&T ALREADY PROMISED TO OPERATE OPEN SYSTEMS? <i>Search Term: DOUBLE-TALK</i> .....	23
9	WHY SHOULD CABLE OFFER OPEN ACCESS IF THE TELEPHONE COMPANIES ARE ALREADY REQUIRED TO BE OPEN? <i>Search Term: DISPARITY MATTERS</i> .....	25
10	WOULDN'T OPEN ACCESS DETER CABLE DEPLOYMENT AND REDUCE INVESTMENT? <i>Search Term: MY WAY OR NO INFO HIGHWAY</i> .....	27
11	ISN'T MULTIPLE ISP ACCESS TECHNICALLY IMPOSSIBLE FOR CABLE SYSTEMS? <i>Search Term: OLD FAVORITES</i> .....	29

12	ISN'T THE FCC LEGALLY BARRED FROM IMPOSING AN OPEN ACCESS CONDITION ON THIS MERGER AND THEREBY "COMMON CARRIERIZING" CABLE INTERNET ACCESS? <i>Search Term: PUBLIC INTEREST</i> .....	31
13	WOULDN'T OPEN ACCESS REQUIRE COMPLEX MICROMANAGEMENT AND TECHNICAL REGULATION? <i>Search Term: JUST BREAK THE LOCK</i> .....	32
14	WOULDN'T OPEN ACCESS MEAN THE GOVERNMENT IS SUDDENLY REGULATING THE INTERNET? <i>Search Term: NAME GAME</i> .....	34
15	SO WHAT SHOULD POLICYMAKERS DO ABOUT THIS MERGER? <i>Search Term: WALK THE WALK</i> .....	36

# **FREQUENTLY ASKED QUESTIONS ABOUT AT&T'S ACQUISITION OF MEDIAONE, OPEN ACCESS, AND THE PUBLIC INTEREST**

*The following presentation of "frequently asked questions" is intended to help cut through the formalities, the word games, and the fog – to get down to what the AT&T/MediaOne mega-merger and the furor over open access are really all about.*

## **1 THE OVERVIEW: WHAT IS THE AT&T/MEDIAONE MERGER REALLY ALL ABOUT?**

*Search Term: MA WEB*

- **AT&T's MediaOne acquisition is essentially an effort to introduce local telephone competition into markets where no such prospects exist, right?**

That's an easy mistake to make, given that the merger application filed with the FCC for this deal follows the pattern set in the AT&T/TCI proceeding.<sup>1</sup> But in the TCI case, the merger did enhance the prospect of local exchange competition because TCI wasn't offering local telephone service. This new merger isn't needed to do that. MediaOne already is a leader in cable telephony – without AT&T. And AT&T already has entered the cable business in a big way – while also showing how, without further mergers, ventures with other cable operators can offer a nationwide footprint for local telephone service.

- **Is the AT&T/MediaOne merger essentially a video mega-merger?**

This is a video mega-merger because it dramatically exacerbates concentration in the ownership of both cable systems and cable programming networks. This fact might be a little less clear because AT&T makes up its own rules about how national cable concentration is to be determined. The FCC has a detailed – and carefully considered – regulatory framework for calculating what kind of financial interests count for the purpose of "attributing" ownership in cable systems to any entity. But AT&T counts its own cable holdings using loose standards for "attributable" interests that the Commission previously has rejected. When you apply the attribution rules that the FCC actually adopted, the magnitude of this proposed consolidation is staggering.

- **Just how big is this "staggering" cable deal?**

AT&T's TCI takeover alone was big enough to burst through the Commission's horizontal ownership ceiling, but this new merger would obliterate that restriction. With the proposed acquisition, AT&T would hold a stake in the only cable system in communities that collectively amount to about 65% of U.S. homes that can be served by cable.<sup>2</sup> And that's not all – this new deal also provides a substantial ownership interlock with systems held under the

umbrella of Time Warner, which means that AT&T will be in close alliance with the only other colossus in the cable world.<sup>3</sup>

Beyond the national concentration effects, the merger accelerates the self-proclaimed “RBOC-ization of cable”<sup>4</sup>—the carving up of cable system ownership into regional clusters such that only one of the few remaining major operators controls a given metropolitan market. In fact, the president of AT&T Broadband has proclaimed that “if [AT&T] is successful, New York and Los Angeles will be the only major cities served by more than one cable company. Within a year . . . seven operators will have about 93% of the USA’s 67 million subscribers.”<sup>5</sup>

This merger also would give AT&T critical ownership interests in Liberty Media, Rainbow Media Sports, and Time Warner Entertainment<sup>6</sup> – a collection of more than two dozen programming channels comprising a majority of the most popular cable fare in the United States.<sup>7</sup>

- **So this is a bad thing for cable subscribers?**

The control that AT&T would gain over the video pipeline reaching the vast majority of U.S. homes, as well as over so many of the top cable program channels delivered by that pipe, strikes at the heart of our nation’s cable policy. Congress has feared just such concentration leading to “a few ‘media gatekeepers’ who could control dissemination of information.”<sup>8</sup> So the FCC has worked to ensure “that no single operator exerts an undue influence . . . on the diversity of programming services available through cable television.”<sup>9</sup>

But even this effort to achieve dominance of the video marketplace does not capture the full impact of the deal.

- **Well, then, is it the broadband Internet access implications of this consolidation that have set off additional alarm bells?**

This is certainly a critical link, even if it’s still not the whole story. The Internet is a remarkable phenomenon – one which, in a few short years, already has transformed the way that Americans communicate, do business, learn, and participate in community and national affairs. As the FCC recognizes, the major force behind the Internet’s growth in the narrowband setting has been the breadth of consumer choice available at all levels of the marketplace.

As broadband technology becomes more widely available, the new and enhanced Internet applications that broadband makes possible will profoundly affect every facet of our society that involves an electronic communications link – from education to online shopping to telecommuting to routine “e-chats” among friends and families scattered across the globe. The prospects for maintaining the Internet’s competitive engine in broadband, however, hinge directly on how “open” the broadband facilities now under construction are to Internet service providers not affiliated with the facility provider. And this merger could well settle that still-unanswered question.

- **How could this merger affect the development of high-speed Internet services?**

The deal would give AT&T a hold not just on the only cable broadband connection to most U.S. homes but also common ownership in the two cable Internet service providers, @Home and RoadRunner, that together serve approximately 98% of all cable Internet subscribers and over 80% of all high-speed Internet access subscribers using any platform.<sup>10</sup>

Either @Home or RoadRunner is connected to these cable systems as the facility's exclusive conduit to the Internet. AT&T thus is leveraging its control over cable facilities into dominance of broadband Internet access. As discussed below, locking up cable Internet access in turn will give AT&T critical muscle over all the content, e-commerce, new applications – and public benefits – which broadband promises. *See FAQ #4, 5, and 6.*

But even the broadband Internet access implications don't reflect the full repercussions of this merger.

- **If neither the traditional video nor the pure Internet access effects capture all of this merger's impacts, then what is the issue?**

It is the combination of these effects that make scrutiny of this merger so important. For AT&T, the MediaOne acquisition is a major step toward the company's establishing a dominant position in delivering integrated video, voice, and data service. This doesn't mean merely one-stop shopping for a bundle of services, but rather the "move towards a single information opportunity that people will turn to for the variety of services that have always been offered separately."<sup>11</sup> And, according to AT&T, its ties to Time Warner "will significantly advance AT&T's ability to offer end-to-end 'any distance' communications services to American consumers and businesses."<sup>12</sup>

- **What does AT&T mean by "a single information opportunity"?**

Like other participants in the marketplace, AT&T sees the convergence of once-separate voice, video, and data offerings into a truly new communications product. In it, telephony is an element, Internet access is an element, and video is a central element – but the ability to exercise exclusivity over the facility that delivers the integrated product is the real key. That exclusive control allows the facility provider to shape the way that consumers link up with competing providers of the voice, data, and video elements via that pipeline.

That's why AT&T announced that it is positioning itself to "eras[e] the boundaries between applications and devices" and provide the dominant high-speed platform to support "the cable device on the TV becom[ing] a virtual communications center."<sup>13</sup> AT&T has dubbed this integrated communications product market – born of "the confluence of the digital age, with its ten-fold increase in transmission capability, its interactivity, and the Internet era" – "the Third Wave."<sup>14</sup> And AT&T sees its opportunity to become entrenched now because "[o]utside [of] the cable industry, much of the world has yet to see this Third Wave coming."<sup>15</sup>

- **What's wrong with AT&T's desire to offer this "Third Wave" vision?**

Nothing's wrong with moving aggressively to compete effectively in the ultimate communications market of integrated services. Far-sighted consumers and many service

providers alike also welcome the coming wave of integrated voice, video, and data service. But only AT&T, with the proposed merger affording it the power to play gatekeeper over the connections critical to this new market, could ride that wave so as to cut off its competitors from reaching the consumers on shore. *See FAQ #4.*

- **The metaphors are getting a bit thick. What do you mean?**

This merger is the next grand step in AT&T's efforts to become the dominant national electronic gateway through which customers and suppliers of integrated voice/video/data service will have to pass. In plainer words still, this merger would advance the company's plan to make sure that consumers "have to go through us" to reach independent service providers. A press account at the time of the AT&T/TCI merger explained that while

[g]oing 'through us' has been cable's game, . . . the Internet and satellites have diminished its gatekeeping powers. Now [John] Malone foresees a *new gatekeeper role*, with the whole cable industry aligning with AT&T to form a single giant network . . . @Home and [RoadRunner] are poised to become *the electronic gateway to the Internet*.<sup>16</sup>

The discussion below explains how this merger would advance this AT&T vision – first, by suppressing Internet-based video competition to its traditional cable service and, second, by using the same transport facility to gain "gateway" control of the new generation of integrated broadband communications offerings. *See FAQ #4, 5, and 6.*

- **But why should the FCC take on the open access issue in this merger when it declined to do so just a few months ago in the AT&T/TCI proceeding?**

Because here the contemplated scope of the horizontal consolidation, vertical integration, and conglomeration in the critical markets makes these concerns a matter specific to this deal – and all the more urgent. *See FAQ #2.*

- **Aren't there just as many benefits to outweigh any harm in this merger as there were before?**

No. This deal wouldn't provide any real benefits that couldn't be achieved without a merger – but it does carry considerably more significant risks of harm to competition in video and data markets, as well as in the emerging market for integrated voice/video/data service. *See FAQ #3, 4, and 5.*

- **Why should a consumer care about competition issues? Aren't they just technical/legal issues for regulators and businesses to argue about?**

Consumers care because the existence (or lack) of competition in cable-based Internet services will affect how much consumers *use* the Internet—what kind of Internet they see, pay for, do business over, create applications for. Competition will directly affect the number of choices, range of prices, degree of quality, and amount of innovation in the communications marketplace – both for traditional and new generation services. *See FAQ #6.*

- **So what is “open access”?**

The term refers to allowing independent, competitive service providers to pay for and use “last mile” communications facilities to reach consumers. Here, “open access” means a nondiscrimination policy that permits unaffiliated ISPs the ability to offer their services to cable-based Internet access customers on the same terms that the cable-owned ISPs – @Home or RoadRunner – now offer on an exclusive basis.

- **Why would open access be the best way to solve the problem?**

Because it would let consumers and non-affiliated content or service providers reach each other without impediment and under fair conditions. Real competition for broadband services would then flourish, providing consumers with new and better products at attractive prices. *See FAQ #7.*

- **Hasn’t AT&T already promised to operate “open” cable broadband facilities? And why should it matter anyway, if the telephone system is already open?**

AT&T’s promise has turned out to be a sham; it still is requiring a consumer who wants broadband Internet service to pay for AT&T’s proprietary ISP first, before the company will allow the consumer to reach his or her preferred ISP. And that matters, even though the FCC mandates that the telco system be open, because of cable broadband’s technical, core video, and timing advantages which – when coupled with the closed model system – could skew investment and handicap providers of alternative broadband facilities, including incumbent local exchange carriers (“ILECs”), seeking to combat exploitation of cable’s broadband head start. *See FAQ #8, 9, and 10.*

- **Is it even technically possible for cable broadband facilities to operate as open systems?**

Yes – in at least three ways, as multiple technical trials have demonstrated and as policy makers obviously believe. *See FAQ #11* (describing GTE, AOL, CompuServe, and Mindspring trials as well as current implementation in Canada.)

- **Aren’t there some legal problems with requiring that cable broadband be open? Wouldn’t this be like regulating the Internet – and isn’t that a bad thing?**

It is important to recognize what open access is *not*. Open access is not governmental meddling in a competitive market; nor is it “regulation of the Internet,” nor is it outside the FCC’s authority to implement.

There are no legal impediments to requiring open access, and it need not be complex. As the Commission said of the current rules applied to local telephone companies, it would just “ensure that Internet services, which rely on telecommunications transmission capacity, remain competitive, accessible, and devoid of entry barriers.”<sup>17</sup> Indeed, open access has long been at the heart of US communications policy and the model for our national information infrastructure. *See FAQ #12, 13, and 14.*



- **OK, so why don't policymakers just require that the AT&T/MediaOne broadband facilities operate as open systems?**

That's a good idea.

## **2 WHY SHOULD THE FCC BE ANY MORE CONCERNED IN THIS MERGER ABOUT THESE ISSUES THAN IT WAS IN THE AT&T/TCI MERGER?**

*Search Term: "NO REGULATORY HURDLES"*

- **So, the AT&T/MediaOne deal presents issues vital to the future offering and integration of communications services – which means the merger is in for tough scrutiny from the FCC?**

AT&T didn't seem to think so. Yet *every party* commenting on this merger—representing a broad range of interests from consumer groups to alternative video or telephony providers to ILECs to ISPs—either opposed the merger or supported approval only subject to critical conditions. From the outset, however, AT&T offered public assurances that the merger “wouldn't encounter significant regulatory hurdles.”<sup>18</sup> The FCC merger application itself dispenses with such standard matters as affidavits, documentation of facts, showings of rule compliance, and requests for necessary waivers.

- **What does that mean – the application doesn't provide the data and documentation the agency needs to review the proposal? Even for telephony?**

Right. AT&T offers assertions, but nothing more, in touting the merger's local exchange competition effect. *See FAQ #3.*

- **What about video – surely the application says something about the enormous concentration that the deal would create in the cable marketplace?**

Nothing pertinent. Although the proposed merger would exceed – two times over – the FCC's current “horizontal cap” on cable system ownership nationwide, the application does not address the agency's rules as they now appear on the books. Nor do the applicants explain how such excess concentration could be justified under these rules. AT&T did, however, offer its own interpretation of the merged entity's ownership reach under ownership attribution standards that the company would like to see exist someday. But then AT&T didn't explain how the deal would achieve compliance even under its own hoped-for standards.

- **Did AT&T explain how it would cure the threat that such excessive cable concentration poses to unaffiliated cable programmers?**

No – even though Congress made clear that this precise concern was the reason for the horizontal cap restriction in the first place.<sup>19</sup>

- **What about the competition concerns surrounding the Internet access issues?**

AT&T's consolidation and vertical integration poses the very same threat to unaffiliated Internet content providers that Congress determined cable system concentration poses to unaffiliated video programmers. Yet AT&T just repeats the empty, generalized promise of "openness" to Internet content that it first made in the TCI deal. And the application doesn't address at all the new concerns posed here by the consolidation of @Home and RoadRunner, the two companies that dominate broadband Internet access. Until now, @Home and RoadRunner at least have had to compete for content and to provide Internet access services for the few unaffiliated cable systems. After the merger, any such competition basically disappears. *See FAQ #5.*

- **Did AT&T address concerns over its emerging role as end-to-end provider of integrated video/voice/data services?**

No. AT&T's public statements suggest that this product offering is central to AT&T's business plan, but it's essentially absent from its application.

- **With all these issues and the debate over open access to boot, how can AT&T be so confident in its request for approval of this deal?**

That's a good question. It seems that AT&T found the FCC's approval of the TCI deal to be not just a green light but a police escort for the continued horizontal and vertical expansion of its closed system model.

- **Why didn't the FCC adopt open access in the TCI merger proceeding?**

Although the Commission acknowledged access concerns in its AT&T/TCI decision, the agency found several reasons not to adopt open access at the time: (1) the TCI merger's promise of facilities-based competition in the local exchange trumped concerns about other anti-competitive effects; (2) the harms of the closed system model were not specific to that merger; (3) AT&T gave the agency a pledge of faux openness for operating its systems; and (4) imposing an open access obligation would be premature in a nascent, sure-to-be-competitive, and not-clearly-separate broadband market. This new merger, however, makes clear a very different picture. *See FAQ #3, 4, 5, and 6.*

- **Are these the only reasons that the FCC didn't act before?**

It may be that the Commission just doesn't know what to make of cable Internet access. That seems to be the agency's position in the brief it filed in the so-called "Portland Case," where a local franchise authority required open access as a condition to approval of AT&T's acquisition of the local TCI cable system.<sup>20</sup> Rather than accept this condition, AT&T sued the city and claimed (among other things) that the Communications Act prohibited local regulators from imposing such an obligation on a cable operator. The federal district court rejected every element of AT&T's challenge. The case is now pending in a federal court of appeals, and the FCC told that court that both of the litigants there – the city and AT&T – relied on a potentially faulty premise by assuming that Internet access via cable is a "cable service" (and therefore to be

treated under cable laws).<sup>21</sup> The Commission acknowledged that it hasn't yet decided what Internet access service via cable is, but it doesn't think anybody else should decide it yet either.

- **But with the size and scope of this deal – and AT&T's open proclamations concerning its business plans for integrated voice/video/data service – aren't the harms in the MediaOne deal both merger specific and urgent?**

Yes. The horizontal and vertical reach of the merged entity would be unprecedented. *See FAQ #5.*

- **Is it fair to take on the issue only with respect to AT&T and not the whole industry?**

AT&T virtually *is* the industry if this deal is approved. Action here wouldn't concern just AT&T – other of the largest cable operators are directly involved in this merger. And the obligations set here could soon extend to most of the rest of the industry as it consolidates through other imminent mergers.

- **But aren't the harms of this merger still offset by substantial benefits?**

Not this time. *See FAQ #6.*

- **Why shouldn't AT&T's "openness" pledge solve the problem?**

Because experience has shown the pledge to be a sham. *See FAQ #8.*

- **So there is an urgent need for the FCC to address the access issue now before we give competition a chance?**

Yes, indeed, there is an urgent need so that we *can* give competition a chance. Business plans for the world of broadband Internet are being shaped *now*, and, absent timely policymaker action, they will assume the continuation of the closed-system technology currently being deployed. The result will be entrenchment of the closed system, making the inevitable renewed efforts to open the system far more disruptive to the market and difficult to implement. *See FAQ #7.*

### **3 DOESN'T THIS MERGER OFFER SUBSTANTIAL PUBLIC INTEREST BENEFITS?**

*Search Term: "TRUST US"*

- **What benefits does AT&T claim for the merger?**

AT&T focuses almost exclusively on the alleged gains for local telephony competition.<sup>22</sup> The company claims the combination would deploy cable telephony more quickly and more competitively and also spread the "enormous investment" needed to deploy cable telephony "over a wider base."<sup>23</sup> AT&T also makes some perfunctory claims that the merger will create benefits in the Internet and video markets, including accelerating the trend toward cable system clustering.

- **How does AT&T show that these benefits will spring from this merger?**

It doesn't – even though the FCC requires applicants to demonstrate that the pro-competitive benefits of a transaction must be “achievable only as a result of the merger.”<sup>24</sup> Merger applicants in other proceedings, such as SBC and Ameritech, have been required to make detailed performance showings.<sup>25</sup> Applicants are not supposed to rely on “efficiency claims [that] are vague or speculative, and cannot be verified by reasonable means.”<sup>26</sup>

Yet the AT&T application provides no service commitments, no implementation schedule, and no investment plan. The application doesn't address the fact that both AT&T and MediaOne already have developed and begun implementing telephony business plans even before the proposed merger.<sup>27</sup> And AT&T is entering into arrangements with Time Warner, Comcast and other cable operators to offer telephony to their customers. So the application doesn't demonstrate that AT&T's taking over MediaOne would lead to any significant public interest benefits that could not be achieved without the merger.

- **Isn't AT&T aware of the FCC standard for evaluating merger “benefits” claims?**

Of course it is. In two recent “telephone company” mergers, AT&T underscored the Commission's rigorous standard for evaluating claimed benefits, attacking those applicants for “not mak[ing] a specific commitment to this Commission . . . let alone provid[ing] the detail necessary to evaluate the benefits.”<sup>28</sup> And so AT&T urged the FCC to “summarily disregard Applicant's claims, contrived for purposes of this application.”<sup>29</sup> AT&T criticized those merger applicants for failing to “make any promise or express any commitment that it will actually pursue [its] strategy if the merger is approved” and derided the efficiencies claimed there as “all achievable without the merger” and “speculative at best.”<sup>30</sup>

- **Are the benefits for telephone competition here unattainable without the merger?**

No. MediaOne was already committed to local telephony service via cable – in fact, it has boasted of being “the leaders in this space”<sup>31</sup> and having “jumped into the telephone market with both feet.”<sup>32</sup> Certainly the company impressed industry observers by making unexpectedly rapid strides in local telephony markets, with penetration rates of 7-8%.<sup>33</sup> In early trials, the penetration rate in some areas went as high as 24%.<sup>34</sup> (Of course, MediaOne had some yardstick by which to measure, having achieved telephony penetration rates of 32% in the UK.<sup>35</sup>) And its \$4.1 billion in planned system upgrades by the end of 2000 put MediaOne at the forefront of cable industry investment in infrastructure.<sup>36</sup> These facts – and the extremely short period of time in which MediaOne has made these strides – belie AT&T's contention that its brand name is necessary for MediaOne's telephony effort to succeed.<sup>37</sup>

- **What about the telephony efficiencies that AT&T claims will be gained by “spreading [the costs] over a wider base”?<sup>38</sup>**

AT&T doesn't explain what costs are being spread and why whatever “spreading” is achieved cannot be achieved without the merger. AT&T has routinely fought other mergers for making the same “bigger is better” argument it now embraces. In fact, AT&T called one merger applicant's claims of efficiencies on this basis “contrivances” and said that “if [the applicant]

believes that it needs greater scale economies to compete . . . , it does not have to purchase another monopolist to obtain that scale.”<sup>39</sup>

- **So what about the benefits AT&T claims for other services – such as the Internet marketplace?**

AT&T doesn’t make any specific claims that this merger will benefit the Internet access market; it just says that its investment in MediaOne is a good thing.<sup>40</sup> Once again, such claimed “benefits” are not merger specific. MediaOne “has always been a leader in providing high-speed data Internet services over broadband.”<sup>41</sup> And the deal does not, purport to even provide consumers with actual choice in their broadband cable company. *See FAQ #5 and 6.*

But – most important – the merger will not create the promised investment incentives for transmission facilities, the content carried on them, or the commerce conducted over them. Instead, the opposite likely will occur: AT&T’s early dominance of broadband transport (and its corresponding leverage over broadband content) may discourage investment in competing broadband facilities and retard the growth of independent content and commerce providers. *See FAQ #9.*

- **And the claimed clustering benefits of the “RBOC-ization” of cable?**

AT&T says that combining with MediaOne will result in “clustering efficiencies” that mostly go to support cable-based local telephony – and the bundling of voice/video/data services generally.<sup>42</sup> It is incongruous to hear AT&T, after years of pointing to the ILECs’ geographic position as an anticompetitive threat, now tout the “RBOC-ization” of the cable industry as a public interest benefit.

And it’s beside the point, because these clustering efficiencies (to the extent that there are any) were occurring without the merger. A section of MediaOne’s Investor Guide devoted to “Competitive Advantages” states that the company already owns “some of the most attractive clusters in the industry.”<sup>43</sup> Even assuming that AT&T and MediaOne could benefit from some clustering efficiencies, the same gains could be achieved through an alliance arrangement, trades, and/or far less harmful combinations.

- **What about AT&T’s claim that consolidation will help video programming diversity?**

AT&T doesn’t really claim that this merger will somehow benefit the functioning of the video programming market – other than to provide some vague allusions to possible “regional programming” that theoretically might appear.<sup>44</sup> To the contrary, the Cable Act made clear that national cable concentration is a grave threat to programming diversity – and the sheer survival of unaffiliated programmers. Lawmakers foresaw the rise of a “few ‘media gatekeepers’” who “could discourage entry of new programming services, restrict competition, impact adversely on diversity, and have other undesirable effects on program quality and viewer satisfaction.”<sup>45</sup> Congress decided that protecting the “diversity of information sources” required limits “substantially below those that traditional antitrust analysis would support.”<sup>46</sup>

#### **4 HOW WOULD THIS MERGER AFFECT ACTUAL OR POTENTIAL COMPETITION THAT THE INTERNET POSES TO TRADITIONAL CABLE SERVICES?**

*Search Term: PRESERVING THE VIDEO CHOKE-POINT*

- **Is the Internet a competitor to cable?**

The Internet certainly competes for viewer attention against both cable and broadcasting video offerings. According to one recent study, "when people have access to the Internet and online services, it erodes the time they spend watching TV . . . [A]dults [with Internet access] spend 36% less time watching TV than do adults who do not have Internet access."<sup>47</sup>

- **Can the Internet ever offer real video programming choices so that it could compete head-on with traditional cable-delivered programming?**

Yes. As the early trends in "video streaming" indicate, the new technology could pose a serious long-term threat to cable systems as a new source of multichannel video programming. Forrester Research reports that 24% of U.S. homes already may be willing to pay for streamed video.<sup>48</sup> One online executive predicts that "[t]elelevision as a communal experience will largely disappear in the next few years. It will be displaced by appointment television enabled by new video storage devices and broadband, Web-based entertainment."<sup>49</sup>

- **Is there enough "streaming video" programming out there to really attract a lot of viewers?**

Initial excitement about the possibilities of video streaming has attracted the attention of a number of program providers – both established ones and newcomers – during the technology's infancy stage. CBS, NBC, ABC, and Warner Brothers are streaming video onto the Internet using technology provided by QuickTime, Microsoft Media, and Real Video, among others. News and public affairs networks such as the Fox News Channel, C-SPAN, and CNN are offering video over their web sites, including some 24-hour simulcasts of their cable feeds.<sup>50</sup> Broadcasting.com itself carries more than 40 local TV station signals. Programmers developing new material exclusively for the Internet include Digital Entertainment Network, Simply TV, and TV on the Web.<sup>51</sup> "RealNetworks, the leading developer and promoter of video streaming, estimates that some 30,000 Web pages . . . now stream video."<sup>52</sup>

So far, this new interest in video streaming has been supported by an influx of capital. For example, CMGI committed \$100 million to the former president of the NBC television network to help him launch an on-line video content service.<sup>53</sup> This future market has led Intel, Sony, and others to invest in Intertainer Inc., a company that plans to deliver movies and other enhanced video over the Internet.

Capital markets would not be investing so eagerly in streaming video applications if real technical limitations were truly believed to limit the viability of this technology. Whether this excitement and investment will be sustained over the long haul, however, very much depends on how widely dispersed – and openly accessible – broadband facilities turn out to be.

- **So video streaming is connected to the roll-out of broadband facilities?**

Definitely. Broadband networks provide the optimal platform for the delivery of streamed video content – which poses an interesting conundrum, to say the least, for the entrenched cable operators. If users and competitive Internet providers can connect with each other through the cable platform, consumers will have a robust new choice in video services. It has been the FCC's goal to create such competition in video services, but it certainly isn't in the interest of incumbent local cable system operators to do so.

- **Is @Home a leader in introducing the new technology to support streaming video?**

Not exactly. As one trade press report put it, “[o]ne irony of streaming video over the Internet is that while cable broadband networks provide fat pipe necessary for quality streaming, major cable online providers @Home and RoadRunner both limit consumers to 10-minute streaming segments.”<sup>54</sup> The two ISPs insert contractual restrictions into their agreements with cable systems that bar the operators from passing through more than 10 minutes of this “quality” programming.<sup>55</sup> Interestingly, the 10-minute cap “applies only to streaming video delivered at a rate of 30 frames-per-second – the same quality used by television stations and cable programmers.”<sup>56</sup>

- **Isn't this 10-minute restriction due to technical problems with streaming video?**

AT&T has said different things about this, as have its @Home partners and @Home itself. For instance, in July 1999, AT&T advised a Senate committee that the time cap is a technical limit designed to prevent congestion on its broadband network.<sup>57</sup> However, in a more recent Senate hearing, AT&T defended the 10-minute limit policy without contending that it was based on technical limitations.<sup>58</sup> Instead, the company stated that the limit was necessary to keep bandwidth costs down. AT&T testified that the company won't remove the time cap unless it can “participate in that video streaming revenue.”<sup>59</sup>

The cable operators behind @Home have plainly stated that they established the 10-minute cap to prohibit “backdoor” delivery of video signals.<sup>60</sup> According to Comcast, the restriction was “obviously designed so that a programmer can't circumvent our channels to put programming on through @Home.”<sup>61</sup> @Home “calls the clause a ‘vestige’ to insure against digital competition with HBO or Showtime.”<sup>62</sup> And prior to its acquisition by AT&T, TCI itself said that the 10-minute cap is a “restriction which we imposed on @Home so that we were the determiner of how stream video worked in our world . . . . The limitation . . . is one that [the company] imposed on @Home so that [we] determined [our] future in the area of streaming video.”<sup>63</sup>

- **So AT&T will never allow video streaming to develop as a competitor to its cable monopoly?**

That's not clear. Once AT&T has established when and how video streaming will aid the company, it presumably will embrace the technology. So, if AT&T is successful in maintaining its role as gatekeeper to the Internet, it no longer will need to control development of a potential competitor to its video delivery system.

- **So what is the bottom line – how are consumers affected by the 10-minute cap on video streaming?**

The streamed video that will be available to consumers will be limited to 10-minute segments, and producers of video content will be limited in what they can deliver. As a result, less content will be developed. This has consumer groups concerned. They observed that:

Through “Quality of Service Controls” cable providers such as AT&T may discriminate against non-affiliated content. Simultaneously, affiliated “cached streaming video, unavailable at any price except to cable operators’ chosen affiliates, comes to users at 1 mb/s, allowing full screen TV quality video . . . . *Without oversight and proper incentives, such controls can and will be abused.*”<sup>64</sup>

## **5 HOW WOULD THIS MERGER AFFECT COMPETITION – BEYOND CABLE’S CORE VIDEO MARKET – IN NEW GENERATION COMMUNICATION SERVICES?**

*Search Term: HEGEMONY*

- **Is there some connection between AT&T’s dominant position in the traditional cable marketplace and its ability to affect competition in the provision of new communications services?**

Yes. Control of the last-mile broadband pipe gives AT&T the opportunity to play gatekeeper and thereby shape the terms by which information of all forms moves through that facility. And based on that key link, the company can exercise leverage to force or steer consumers to all the other services AT&T offers at every point along the full end-to-end communications pipeline.

- **Just what comprises this “end-to-end pipeline”?**

From the consumer’s perspective, it starts with the end of the pipeline connected to the television set: the set-top box. As described below, Microsoft has invested aggressively to ensure its position in this critical point of entry to the cable broadband pipeline.<sup>65</sup> Inside the box is the software that operates the set-top device. The box and software together provide the consumer with his or her first opportunity to make a content selection – the electronic program guide or “EPG.”

For an Internet connection, AT&T systems automatically hook up to the cable ISP @Home (and, after the merger, RoadRunner on some systems). The ISP provides the means to reach Internet content, which includes (1) immediate links to favored sites, and (2) less technologically favorable connections to unaffiliated sites.

The cable broadband system itself, of course, is the leading last-mile link from consumers’ homes to the backbone of the larger wireline network. So the cable “local loop” is



the funnel through which all electronic communications may pass – video, data, voice, and with the advent of integrated communications service, new combinations of all three.

- **Where does AT&T fit in?**

AT&T's got an interest in set-top boxes and, together with Microsoft, in the software that operates them – the first possible “choke-point” at which AT&T could begin steering consumers toward favored services. AT&T owns the EPG on its systems – the first obvious content selection mechanism and thus a second choke-point. AT&T owns the ISP on its systems – yet another choke-point. And of course AT&T owns the broadband cable pipes – the ultimate choke-point.

- **So the cable system is the “pipeline” through which everything flows?**

Yes – and not just for cable service alone or data service alone but for the whole package of components that make up integrated communications service, including full video services and two-way, interactive Internet access. AT&T is upfront about its plan to “deliver integrated telephony, entertainment and high-speed Internet access services and a host of new communications capabilities to customers.”<sup>66</sup>

- **That sounds pretty innocuous – aren't all those services good things?**

The services themselves are great. But remember, in AT&T's case the services are coupled with ownership of the leading high-speed transmission facility itself – and the corresponding sway AT&T has over other choke-points that affect how (or even whether) consumers reach their ultimate goal, the content. Plus, AT&T's ability to offer all components of integrated communications services – video, data, and voice – means AT&T also may be able to force consumers to take services they don't want from AT&T in order to obtain services for which AT&T is the dominant provider. That's what is happening right now with respect to its Internet access offerings: as the dominant provider of broadband transport, AT&T is forcing cable Internet customers to purchase its affiliated ISP offering.

- **Those are some pretty sweeping statements – can you break the point down a bit?**

Sure. It's true that AT&T's control over broadband transport has some limits. There may be alternative platforms for Internet access, like there are lesser alternative “multichannel video programming distributors” such as DBS to vie with traditional cable operators. That means a broadband cable operator like AT&T cannot fully exploit its dominion over high-speed access by relying just on its transport business. So the company has incentives to leverage its power vertically, too.

And leveraging into broadband content and commerce businesses, in turn, offers AT&T profit margins from the combined offering beyond those that the company could achieve in the access and transport markets alone. AT&T Canada has made the same point as to entrenched Canadian cable operators: “this dominance in the broadband access market . . . can, in turn, be used by the cable companies to leverage their position in the delivery of non-programming services, the vast majority of which will be carried on their cable network facilities.”<sup>67</sup>

- **Bring this discussion down to earth – where could all this anticompetitive “leveraging” start?**

At the very beginning. From the consumer’s perspective, that means the initial software interface, now generally called the electronic program guide or “EPG” in cable terms. That’s the selection guide that consumers now use to pick their mostly traditional programming options now – but which is positioned to become the critical software interface between consumers and all their electronic communications options. EPGs could function as a kind of initial browser for a set-top box “computer” that uses a TV set like a monitor.

And the cable industry has made plain that it alone will determine which EPG goes on which system and displays which programming options. AT&T, which has its own EPG service, has certainly not deviated from the industry line that operators “should not be forced to make room for a third-party program guide.”<sup>68</sup>

- **That sounds pretty serious, doesn’t it?**

The FCC seems to think so. The Commission stated that it is “committed to encouraging the development of the market for the provision of . . . [EPG] services as part of our broader goal of promoting consumer choice” and that it “will monitor developments with respect to the availability of . . . [EPG] to determine whether any action is appropriate in the future.”<sup>69</sup> Chairman Kennard has noted that he is “very concerned that a variety of . . . [EPGs] be made available to the consumer.”<sup>70</sup>

But when the FCC adopted rules designed to ensure the “commercial availability” of navigational *equipment* from manufacturers and retailers not affiliated with cable operators, those protections were not extended to navigational *services* – including EPG services – offered by independent providers.

- **How does this software interface actually reach a consumer?**

Through the set-top box and the software that operates it – which, as AT&T has said, is to function as “a virtual communications center” for providing integrated voice/video/data service.<sup>71</sup>

- **Who supplies the set-top box?**

General Instrument is the largest supplier of set-top box hardware – and AT&T has an ownership stake in GI.<sup>72</sup>

- **And the software that operates the set-top box?**

Microsoft has a major position in software development for the set-top box – and it has a \$5 billion ownership stake in AT&T. That’s only one of several investments that Microsoft has made along the way to gaining commitments to the purchase of its software for as many as 10 million boxes.

These alliances could readily enable the AT&T/Microsoft standard to become the predominant EPG industry standard. Microsoft views the deployment of set-top boxes as a

“great opportunity” to re-create a dominant role for Microsoft in interactive digital television as it has done in the computer industry.<sup>73</sup> Indeed, “forcing Windows CE on the cable industry” has been described as “a virtual religious crusade inside Microsoft’s headquarters.”<sup>74</sup>

- **So Microsoft could end up dominating the “operating systems” for set-top boxes – just like it did with PCs?**

It sounds like that’s what’s up, as a result of AT&T’s deal with Microsoft for set-top software and its deal with @Home for exclusive provision of cable Internet access services.

- **So the set-top box is the consumer’s connection to the cable system. And AT&T controls a lot of cable facilities and also has a stake in the devices and software that consumers use to obtain the content they want?**

Right. And with this merger, AT&T would control or hold a significant stake in cable systems covering almost two-thirds of the nation.

- **OK, if AT&T takes over MediaOne, it would own not only the broadband pipe and interests in the set-top box – and also in the key content that flows over its facilities, too?**

An enormous investment, beginning with its hold on traditional video programming. By virtue of its TCI acquisition, AT&T already owns and controls the huge programming stable of Liberty Media Group, the producer, packager, and/or distributor of more than two dozen of the most popular cable channels.<sup>75</sup> AT&T also has an indirect stake in Rainbow Media Sports Holdings, which offers yet more specialty programming channels.<sup>76</sup> Then the MediaOne deal would give AT&T a 25% equity stake in the Time Warner cluster of program channels that include acclaimed outlets – such as HBO – that the FTC (in challenging the Time Warner/Turner deal) called the “crown jewels” of cable programming channels.<sup>77</sup>

- **Why should AT&T’s offering of a lot of video programming options be a competitive issue?**

Offering the programming channels alone isn’t the issue – it’s the combined control over the transport facility and the content/commerce flowing over it that is the issue. As the Federal Trade Commission found in challenging Time Warner’s acquisition of Turner Broadcasting, vertical integration in the traditional cable industry poses “the threat of foreclosure” of non-affiliated content providers that is “both real and substantial.”<sup>78</sup>

- **But what about the Internet – does the same pattern apply?**

Yes, it’s the same pipeline with the same general opportunity for the facility provider to steer consumers toward favored content (and away from other content options). Broadband cable operators like AT&T require consumers to go through a cable-proprietary ISP, which the operator connects to its transport facility as the only option for Internet access. For AT&T to date, that has meant requiring consumers to subscribe to @Home, but this merger would give AT&T ownership rights in the only other major cable ISP, RoadRunner, which is the lone service option found on the MediaOne systems.

- **And why does this exclusive cable ISP arrangement make any difference?**

Because the ISP serves as a critical valve in the last mile broadband pipeline between consumers and Internet content/service providers. In the narrowband Internet world, consumers can reach all ISPs equally – and can make their choice on the basis of price and service quality. But consumers using cable broadband have no such choice. They either pay upfront for the cable ISP (@Home or RoadRunner, depending on the system) or cable operators won't provide them, with high-speed cable transport service at all.

As one analyst has explained, this closed system disadvantages providers of Internet access, backbone, portals, content, and commerce that are part of the “protected ‘parallel Internet’” controlled by cable.<sup>79</sup> This, in turn, skews market valuations, reduces investment, and ultimately limits consumer choice.

- **So AT&T also has a stake in Internet content sites?**

Lots of them, and it will get more sites under the MediaOne deal. The new combination's offerings provide text, pictures, video, and all sorts of links on a wide range of popular topics.

- **Don't other ISPs also have their own exclusive content arrangements?**

Yes, but the other ISPs don't have exclusive control of the transmission facility.

- **But there are literally thousands, if not hundreds of thousands, of content sites on the Web. Why does it matter if AT&T owns some of them?**

AT&T is making its proprietary ISP the only “guide” available to customers using cable connections to the Internet, thereby influencing (if not *controlling*) where and how quickly its consumers “go” on the Web. For example, in the case of @Home, AT&T's first possible choke-point lies in the portal Excite, which recently merged with the cable ISP. Controlling the portal is very important, because portals depend on advertising for income, and advertisers, of course, are drawn to the portals that get the most eyeballs. But it is not the “steering” per se that is the essential concern – it's the linkage of control over the facility with the mandatory use of the facility provider's steering mechanisms that matters.

- **Is technical manipulation also possible?**

Yes, there are a variety of methods available. As a group of consumer organizations pointed out, “the cable broadband networks can be intentionally manipulated to provide wide bandwidth to the user for commercially affiliated content, but significantly less bandwidth for generic and cable-unaffiliated Internet traffic.”<sup>80</sup> In cataloguing the anti-competitive options available to cable providers, they observed that “quality of service controls” may be used to discriminate in even more distressing ways.<sup>81</sup> A cable operator could block access to certain web sites and give preferential treatment to certain types of traffic flowing across a network.<sup>82</sup> This technology isn't new or unique; it is available as a feature from several manufacturers of network equipment for cable systems.<sup>83</sup>

In addition, AT&T and its affiliated ISPs can use the ability to cache frequently accessed content on their servers to disadvantage non-affiliated providers. “Caching” significantly decreases the download time of the cached content, and therefore sites that are *not* cached take significantly longer to appear on the screen. With so many sites on the Web, surfers often will move on rather than wait for a “slow” site to download. If other ISPs are effectively denied the ability to provide consumers comparably cached content (because consumers cannot directly access those other ISPs), then their service always seems slower than the affiliated ISP who is able to provide the same (cached) content more quickly.

- **This is all pretty disturbing – is it the whole picture?**

Not completely. There’s the Internet “backbone” business – the provision of high-speed trunk lines and other services that criss-cross the nation and the world. To date, the backbone business has been competitive, with AT&T as only one of several players. But since AT&T acquired a controlling stake in @Home, that ISP has exclusively committed in a 20-year contract to use AT&T’s affiliated backbone provider.<sup>84</sup> Consequently, any video customer wanting integrated services must first go to @Home, which will always then direct the traffic through AT&T’s backbone. In addition, AT&T’s control over access to the vast majority of high-speed Internet subscribers will give it power to leverage against other backbone providers in interconnection and peering relationships.

And then there’s the local telephony market. AT&T of course intends to offer switched voice services over its broadband pipe, too. But it also will be offering local telephony over lots of cable systems that it doesn’t own, thanks to exclusive agreements being reached with Time Warner and about a half-dozen other large cable operators. The MediaOne deal and the other agreements should enable AT&T to dominate the cable telephone field for a long period of time. (Plus it already is the nation’s largest provider of wireless services – and, thanks to the MediaOne deal, will acquire additional cellular and personal communications services.)

And this local telephony will, obviously, be paired with AT&T’s long-distance service, which remains the largest in the nation – and obviously is AT&T’s “other” core market to defend.

- **OK, tell me again – why isn’t this just a “one-stop shopping” package that should be good for consumers?**

One-stop shopping is good for consumers – when they can take it or leave it. Or, in Chairman Kennard’s words, one-stop shopping benefits consumers “only when all providers have a fair and realistic opportunity to offer each service that goes into the bundle.”<sup>85</sup>

That requires a competitive marketplace where consumers have other options for critical elements of the end-to-end service. At a few key choke-points – such as broadband Internet access – AT&T basically would be the only seller in town. It’s the end-to-end control, not the one-stop shopping itself, that’s the issue.

**6****WOULD THIS MERGER REALLY HARM CONSUMERS?**

*Search Term: COMPETITION WITHERS*

- **Is this merger just a threat to AT&T's business rivals or is it really a threat to me as an everyday consumer?**

Leading consumer advocacy groups – including Consumers' Union, the Consumer Federation of America, the Media Access Project, and the Center for Media Education – say that it will hurt you, the consumer: “The combination of the historically closed video programming clout of [the cable industry] with a closed, discriminatory Internet access model is cause for grave concern.”<sup>86</sup> The reason why is because the consolidated AT&T/TCI/MediaOne would have power to reduce or eliminate consumer choices in the marketplace. This might take the form of foreclosing potential competition outright, but the new multimedia giant could achieve the same result by undermining investment and innovation in other broadband technology and non-affiliated broadband content services. And eliminating choices means that consumers are deprived of better quality service at lower prices. So unconditioned approval of this merger means that consumers lose – without, as noted above, receiving real offsetting benefits. *See FAQ #3.*

- **Why does it matter to me that AT&T/MediaOne would have so much power to flex its market muscle?**

It all comes back to AT&T's power over the leading broadband pipe able to serve the majority of American homes. That cable facility is uniquely positioned to offer a full range of video, Internet, and telecommunications services – and AT&T can couple the transport system with its own service offerings that compete against other providers' offering on the same pipe.

- **So is this basically the same pattern that cable operators used to shape my traditional cable programming choices and the rates I have had to pay for traditional cable service?**

Exactly. While vertical integration of transport service and content service can provide significant benefits, Congress, the FCC, and federal antitrust authorities have all found that the extent to which the cable industry combines its nationwide cable system concentration and its vertical integration into programming sources can harm consumers and unaffiliated content providers.<sup>87</sup> The Federal Trade Commission found that this traditional cable industry model creates “real and substantial” threats to competition by creating incentives to “(1) foreclose unaffiliated programming from their cable systems to protect their own programming assets; and (2) disadvantage competing MVPDs [through] price discrimination.”<sup>88</sup> AT&T's broadband Internet strategy provides the same type of opportunity for anti-competitive behavior in a new setting.

- **Why should I care about vertical integration as long as I can get access to all the content sites?**

For several reasons. First, it's not clear that consumers *can* get the same kind of access to all content sites when the transport facility provider (who also competes in the content market) can use caching and software to deny or slow access to nonaffiliated sites you may want to visit. You may not even know that the downloading or general accessibility is being manipulated, but wouldn't you *rather* reach all content as quickly as possible? Second, you're paying for the content chosen by cable's affiliated ISP even if you don't want it. Third, by dominating both broadband transport *and* access services, AT&T will be in a better position to ensure that the Internet's potential for video streaming doesn't erode the company's dominance of traditional multichannel video service.

- **But AT&T surely knows that I won't stand for being limited in obtaining a broad choice of Internet-delivered content, right?**

True, but keep the cable programming precedent in mind. Traditional cable customers wanted lots of programming, including from independent providers – but those networks often couldn't gain fair access to cable. Policymakers have had to step in to try to ensure that independent programmers get a fair shot at viewers.

In the Internet marketplace, customers will demand a broad menu of content, too; that is what the Internet is all about. But as with traditional cable, the transport/access provider's power in the Internet context lies in its ability to favor certain content and restrict the terms of access to other content – like streaming video, for example.

- **Would AT&T really cut me off from content choices this way?**

Cable operators already have – via the proprietary ISPs and EPGs. In AT&T's case, broadband subscribers will get only @Home (and, after the merger, RoadRunner on some systems) as their conduit to the Internet, and they'll have only one EPG as their selection mechanism for other content.

- **But how seriously could AT&T limit my choice given all of the broadband content and commerce sites out across the Internet?**

There are several ways in which consumer choice may be frustrated by combining conduit and content. As noted above, control over the proprietary ISP (and EPG or browser) gives a facility operator the ability to steer consumers toward favored sites. Also, by requiring subscribers to pay a separate, full charge for an independent ISP – including the cost of two high-speed transport facilities – AT&T effectively discourages consumers from trying other ISP options and the content they might feature.

- **But AT&T says it will even put my favorite ISP icon on my opening screen – so how could it be limiting my choices then?**

Consumer groups explain that “[a]s currently designed and deployed, ‘click-through’ access in cable-based broadband architecture does not guarantee non-discriminatory access for independent ISPs [and] does not prevent preferential marketing that favors affiliates.”<sup>89</sup> So, for example, AT&T could discriminate against non-affiliated products or providers by (1) slowing

sites' downloading speeds or refusing to let them cache on the affiliated ISP's server; (2) excluding disfavored sites from appearing on AT&T's affiliated portal and the all-important "first screen"; or even (3) simply restricting customers' access to certain content, with tools like the 10-minutes video streaming limit or "Quality of Service" controls. Each of these practices further aggravate the closed system's negative impact on the Internet and downstream markets—particularly emerging e-commerce markets. [footnote Cleland]

This is all in addition to the fact that you will have to pay for the cable affiliated ISP even if you don't want to use their services. And you might never know what you are missing – as in MVPD services today, where you can't buy an alternative "bundle" of video services in smaller or larger packages than the cable operator chooses to give to you.

- **Would consumers know when they are being directed by AT&T to certain sites?**

Not necessarily. Consumer groups recently advised the FCC that "[s]pecific content, regardless of type, can be limited based on its origin . . . . Unless real open access is provided, consumers will soon discover not only that they have no choice in broadband service provider, but that their full access to the vast resources of the Internet has been limited as well."<sup>90</sup> So a consumer may never know the extent of the content to which he was denied access.

- **What is the bottom line for me, the consumer?**

The news is not good. Continued video market power means continuation of the "cable problem" – consumers frustrated by rising prices, poor service, and restricted choice. Just a few months ago, the FCC recognized that cable "continues to occupy a dominant position" in delivering multichannel video programming services to American homes.<sup>91</sup> Only when incumbent cable operators have faced competition from cable overbuilders do they respond by "lowering prices, adding channels at the same monthly rate, improving service, or adding new services such as interactive programming."<sup>92</sup>

The Internet, by contrast, has thrived because there has been intense competition from the outset in price, performance, service, innovation, and content – all based on the foundation of an open last-mile transmission platform. Importing the traditional closed cable model to the Internet would afford consumers little choice among ISPs or in price/performance alternatives. Also, easy-to-access content will largely be affiliated with AT&T, and innovation will stagnate for lack of any long-term competitors. In short, without open access to the broadband platform, the new generation of Internet services will not fulfill their potential to bring consumers greater innovation, quality, and choice – all at competitive prices.

## **7 WHY IS OPEN ACCESS THE BEST REMEDY?**

*Search Term: OUNCE OF PREVENTION*

- **Just what is "open access"?**

The term refers to the ability of consumers to choose the Internet service provider of their choice, not one chosen for them by their local cable company (or, for that matter, one chosen by their local telephone company). Enabling consumers and their chosen Internet service providers



to reach each other requires that Internet service providers not chosen by the cable company have the ability to purchase, on a nondiscriminatory basis, the use of “last mile” communications facilities to reach consumers who are requesting their service.

- **And what is the effect of open access?**

It denies transport providers the ability to grant access exclusively to their proprietary Internet service providers. As a result, rival services are able to compete fiercely for consumers’ favor – by offering new and better products at attractive prices – because the transmission links are available under fair terms to all of them, whether affiliated with the transport provider or not.

- **What’s at risk if the FCC doesn’t act now to ensure open access?**

Whether consumers and the nation will gain the full benefits of broadband deployment that U.S. policymakers are working to promote. The investment needed to support the broadband build-out is directly tied to demand for services – particularly video or video-enriched services, either alone or as a component of integrated voice/video/data service. Cable broadband currently is the transmission medium best able to support such fully integrated services.

As our experience with narrowband already has proven, consumer demand for new communications services has been fueled directly by the competitive choices available via an open network pipeline. Internet pioneer Vint Cerf has explained that “[t]he skyrocketing growth of Internet applications under the current open-access model is proof that open access to the Internet leads more players to make greater investments, spurring innovation and benefiting everyone.”<sup>93</sup> *See FAQ #9 and 10.*

- **With all the activity that seems to be going on in the marketplace, can’t we just rely on competition to produce alternative ways to get broadband access to the Internet?**

For competition to work, consumers have to have choices. *See FAQ #8.* Absent access to the cable platform for competitive service providers (on fair commercial terms), consumers will not have a choice among integrated service offerings that include video. *See FAQ #6.* Competition and consumers will both suffer until all broadband facilities are operated as “open” systems.

- **What would happen if policymakers just monitor the situation for awhile?**

AT&T’s early advantage in broadband would be entrenched and expanded – end result: Ma Web reigns. But, for now, the architecture is still under construction, and so technical systems aren’t yet set in stone. The broadband business models are still being built, too, though these models can be expected to take hold in hyperfast “Internet time.” So it’s crucial to act now.

- **Well, if “Ma Web” really ever reigns, couldn’t policymakers just fix it then?**

The only solution at that point could be radical government intervention of some sort. Maybe it would follow the old Ma Bell pattern: decades of litigation leading to a court-ordered bust-up of the Ma Web conglomerate, followed by 10 years or more of efforts to pass reform legislation needed in the wake of that bust-up. Or maybe it would follow the cable market

model: massive deregulation that roils the industry, swamps the FCC, and still fails many consumers. Or maybe instead of structural change, the government would pursue step-by-step conduct oversight – like it has done with the computerized airline ticket reservation system – to make sure that the system owner doesn't skew the network to favor its affiliated service providers or restrict competition (as with the 10-minute limit on video streaming). These all are alternative means of attempting to remedy anti-competitive power and practices; they just aren't very good ones.

- **So why is an open, nondiscriminatory access condition on this merger now the best alternative?**

Because it is a limited step and it's eminently do-able. Policymakers have a real opportunity to establish open access as a fundamental competitive rule of the road now, while the marketplace is still churning and neither infrastructure nor business models are set.

- **So competition, not expansive regulation, is the answer after all?**

Yes, competition enabled and safeguarded by a narrow policy fix now – which will spare a sweeping and still inadequate effort to unscramble the egg later.

## **8 HASN'T AT&T ALREADY PROMISED TO OPERATE OPEN SYSTEMS?**

*Search Term: DOUBLE-TALK*

- **Isn't AT&T on record in support of an open model for cable Internet access?**

Yes. AT&T has repeatedly expressed its "passionate commitment" to "complete neutrality."<sup>94</sup> In explaining the company's "open broadband strategy," AT&T has said that open broadband is not only the "right thing to do," but also in the company's "self-interest."<sup>95</sup> AT&T explained that the term "open broadband" means "a level playing field, in terms of access, to that broadband."<sup>96</sup> Indeed, AT&T previously stated expressly that it "would favor the unbundling of the modem in order to provide consumers with choice and lowest prices."<sup>97</sup>

- **Didn't AT&T even commit to open access in writing to the FCC?**

In seeking approval for its merger with TCI, AT&T submitted a letter to the FCC where it explicitly promised an open model for cable Internet access:

"AT&T and TCI recognize that denying their customers access to online services would not be in their or their customers' best interest. If an online service provider offers a service that TCI's customers want, then AT&T and TCI want customers to have unimpeded access to that provider. We believe online service providers likewise have an incentive to reach agreement with AT&T and TCI, because a provider can gain enhanced advertising and e-commerce revenue through the additional TCI customers that

will be reaching its service via TCI's network – a win-win situation.

Even if an online service provider cannot or does not want to enter into such an agreement, customers of TCI@Home can still access that provider through their TCP/IP connection using a 'bring-your-own access plan' like that actively marketed by AOL . . . They do not have to 'go through' @Home or view any @Home-provided content or screens."<sup>98</sup>

- **Sounds like a real commitment to openness. Didn't the FCC expressly rely on it in approving the TCI merger?**

Yes. In approving the AT&T-TCI merger, the FCC stated: "We take this representation seriously [and] we will monitor broadband deployment closely."<sup>99</sup> More recently, the Commission emphasized that it "relied in part on AT&T's and TCI's representation that TCI subscribers could continue to bypass @Home and gain *direct access* to other providers of Internet content services."<sup>100</sup>

- **But when FCC Commissioner Ness asked repeatedly whether a customer "would not have to pay for @Home if [the customer] wished to have access to a different ISP,"<sup>101</sup> did AT&T provide reassurance?**

Well, no. AT&T's spokesman cited the company's "strategy of complete neutrality vis-a-vis . . . online service providers."<sup>102</sup> But then he explained that a subscriber, "having chosen my form of access to the Internet . . . can go to an online service provider *through my screens* . . . without any interference through my system."<sup>103</sup> In other words, consumers would be forced to use the affiliated ISP, begin at that ISP's start page, and then be subject to the ISP's discriminatory whims in terms of making certain content difficult to find or slow to access.

- **Sounds confusing. Can you explain what AT&T is *really* saying?**

@Home has been a little clearer: "We have access to the home. If [another ISP] wants to get there with broadband, *they will have to work through us*."<sup>104</sup>

- **Couldn't another ISP reach AT&T broadband customers directly, without having to pay for @Home?**

That's "[r]idiculous" notion, according to @Home.<sup>105</sup>

- **So, if a customer wants a different Internet service and content provider than @Home, he or she has to pay for @Home's offerings and then again for the offering of his or her choosing?**

Right.

- **But AT&T says consumers can just “double click” through to any content on the Web.**

Again, that works only if you pay for, and go through, @Home first. This is the same as saying that a consumer could use any long-distance provider just so long as they bought AT&T long-distance first.

- **But isn't @Home at least neutral as to content? And consumers can go anywhere on the Internet?**

Neutral? As if all content is equally accessible at equal speed without restrictions? No. See FAQ #6.

- **Well, however they have qualified it, AT&T still stands by its own version of openness, right?**

That's unclear. In opposing Portland's open access efforts, AT&T rejected the assertion that it had agreed to allow subscribers to “obtain access to all on-line providers through its TCI/@Home service,”<sup>106</sup> all but admitting that it intends to restrict its consumers' access to competing providers. More ominously, AT&T unabashedly rejected Portland's claim that an “open access condition would not alter the content that travels over [AT&T-TCI's] systems, but would merely allow subscribers to obtain the same content through direct access to [unaffiliated] ISPs.”<sup>107</sup> If the content transported would be different depending on whether the consumer is a customer of AT&T's affiliated ISP, the natural conclusion is that intends to influence, restrict, or control the web content the consumer can receive.

- **So is AT&T open or not?**

It depends on what you mean by the word “open.”

## **9 WHY SHOULD CABLE OFFER OPEN ACCESS IF THE TELEPHONE COMPANIES ARE ALREADY REQUIRED TO BE OPEN?**

*Search Term: DISPARITY MATTERS*

- **Can't telephone companies provide over DSL everything that the cable companies offer over their broadband?**

Not everything. Only cable providers command the significant video programming piece of the total communications package.

And not nearly everywhere. While cable plant passes nearly all U.S. homes, the primary form of DSL is only a potential competitive option for those local exchange customers with conditionable loops of approximately 12,000 to 18,000 feet or less.<sup>108</sup>

- **What about other broadband platforms – such as satellites, terrestrial wireless, or utility company networks? Can't they compete with broadband cable?**

They face still greater challenges than does DSL. These other platforms are just beginning to overcome some difficult technical issues and do not enjoy the head start that both telephone networks and cable systems enjoy by virtue of their longstanding government-established market-wide franchises. Moreover, cable enjoys an even greater first mover advantage over these services in light of the small percentage of the population currently utilizing alternative platforms.<sup>109</sup>

- **Does this really matter in the broadband Internet marketplace?**

These technical and market factors have led to a 4:1 penetration advantage for cable modem access over DSL – a market advantage that, as explained below, is not likely to change significantly in the short term.<sup>110</sup> And that advantage matters particularly in light of the fact that, with this merger, AT&T would have a financial stake in broadband access links passing more than 98% of all cable Internet subscribers.<sup>111</sup>

- **Why not just let the marketplace sort out which facility wins?**

Because this closed system for cable Internet access doesn't just disadvantage competitors – it erodes competition and thereby hurts consumers. Cable's early advantage as a facility for integrated video/voice/data service can be solidified by a closed system with a virtually exclusive hold on the provision of video programming. This closed system gives AT&T the ability and incentive to leverage its dominance into the high-margin content and software markets. Set-top box and cable modem manufacturers, along with unaffiliated content and video providers, would be attentive to AT&T's every exclusionary proposal for fear of being locked out of the leading broadband access market. Even with the option of DSL access, no provider will voluntarily pass up the cable broadband market in order to target DSL.

- **Won't the potential dominance of the closed cable broadband model only spur telephone companies to invest in and deploy DSL more quickly?**

No. Not only is it inequitable for the government to treat two similar facilities in dissimilar fashion, this actually reduces the prospects for alternative facilities and thereby discourages investment. Further, a closed cable system means that ISPs as customers of data transport are deprived of the benefits of facilities competition between ILECs and cable. In contrast, under open access, ISPs could obtain high-speed transport without wholly relying on DSL deployment. So it is only under an open cable model that ILECs would have every incentive to increase deployment lest they lose their ISP customers to cable.

- **So two open systems actually creates real facilities-based competition for Internet access?**

Absolutely. In open systems, non-affiliated service providers could choose between last-mile telephone facilities and cable facilities based on relative price, performance, and features offered by each. Such competition has driven the initial rapid deployment of the Internet in

narrowband. Consumers would also enjoy the full range of options that facilities-based competition would bring. And real competition, in turn, would speed the day that local networks might be deregulated.

- **Isn't "open access" just an effort on the part of narrowband ISPs to slow down broadband cable as sources of Internet competition?**

Not at all. Broadband offers great advances in the speed and the types of content and services the Internet can provide. Leading ISPs want to be there, and they are pursuing access arrangements with every viable platform.

So, independent ISPs want cable operators to deploy broadband quickly, just as they want telephone companies and other transport providers to deploy their broadband technology quickly. Independent ISPs are ready to compete with cable ISPs – but they need access to the cable facilities in order to do so. And, as explained below, open access would spur, not slow, broadband deployment generally.

## **10      WOULDN'T OPEN ACCESS DETER CABLE DEPLOYMENT AND REDUCE INVESTMENT?**

*Search Term: MY WAY OR NO INFO HIGHWAY*

- **Why would AT&T invest in broadband if it has to open up its system to competitors?**

From the start, AT&T has claimed that it was the entry into the local telephony market that provided its incentive to invest in cable broadband.<sup>112</sup> In addition to telephony, AT&T/MediaOne's expanded basic cable and pay-per-view programming opportunities will also offer significant additional profit incentives to invest in the broadband network.<sup>113</sup>

- **Given what AT&T said in the TCI merger proceeding, would it really now back away from pursuing its cable telephony investment?**

No. In the TCI merger, AT&T said it would accelerate the upgrade of TCI's infrastructure in order to offer local telephonic service more quickly, and the Commission squarely relied on that "demonstrated . . . intention to actually provide residential local exchange service."<sup>114</sup> Moreover, AT&T's application here touts the "tens of billions of dollars of shareholder assets [used] to acquire TCI and modernize its cable network in order to provide residential customers with local exchange and exchange access service."<sup>115</sup> Given AT&T's commitments to the FCC and to shareholders, surely AT&T is not about to back away from the cable telephony market.

- **But doesn't it take a significant amount of additional capital to upgrade a cable system for Internet access?**

Not according to the cable companies. There is only a "modest incremental cost" associated with providing Internet access once capacity has been established for the other services in the multimedia cable pipe.<sup>116</sup> As MediaOne explained to its investors, the

“basic upgrade makes the network ready to carry two-way services, including advanced video, high-speed data and telephone services. Once the network has been upgraded, most of the other costs associated with new products are revenue-led. In other words, you don’t need to install customer premises equipment until the customer signs up for the service and starts generating revenue.”<sup>117</sup>

- **Even if the investment is small, won’t AT&T have an incentive to decline to offer Internet access services because open access will make it uneconomical?**

Not if AT&T is a rational economic actor. Open access is not a free ride. A nondiscriminatory transport fee would still allow AT&T to recover full transport costs plus profit from each and every interconnecting provider.

And AT&T would still be free to compete – based on cost and quality – with other ISPs for the content customer. As Forrester Research observed, “[c]able companies can make money as providers of high-speed access for other ISPs. Instead of gnashing their teeth, large cable operators should make their networks the best transport alternative for providers of all types of telecommunications services.”<sup>118</sup> According to AT&T itself, “the only way to make money in networks is to have the highest degree of utilization.”<sup>119</sup> Open access would allow AT&T to do just that, fostering a wholesale broadband transport business that would drive down prices and fuel innovation.

And AT&T would still be free to compete — based on cost and quality — with other ISPs for the content customer. Indeed, AT&T’s ISP may still maintain a competitive advantage over other ISPs by its ready ability to offer bundled – but no longer tied together – ISP, cable, telephony, and sundry other services over their own multimedia wire.

- **In a broader sense, would open access deter overall investment?**

To the contrary, open access would fuel greater total investment in broadband. According to AT&T itself, in discussing the investment incentives in advanced services over telephone platforms, “advanced services are most likely to reach all Americans if incumbents are subject to unbundling obligations to permit additional competitors to provide services. Absent the essential unbundling obligations, ILECs would not have the incentive through competition to invest in the provision of advanced services.”<sup>120</sup> Moreover, one need look no further than the CLEC marketplace to see that open access is fully compatible with attracting vast amounts of new capital into an emerging market.

So, under open access, ISPs and content providers will invest extensively to use, support and drive a growing broadband service market. In contrast, a closed system effectively locks ISPs out of the cable multimedia market. Open access also promotes investment in backbone facilities by multiple providers as competing ISPs search for the most efficient provision of these services. And, as discussed above, open access would also spur greater ILEC investment and innovation to attract ISPs choosing local facilities to offer high-speed access.

## **11 ISN'T MULTIPLE ISP ACCESS TECHNICALLY IMPOSSIBLE FOR CABLE SYSTEMS?**

*Search Term: OLD FAVORITES*

- **Haven't AT&T and other cable operators said that it is technically impossible to implement open access on a cable system for multiple ISPs?**

Yes, it is something of an industry refrain. For example, @Home partner Cox Communications has stated that "it is not technically feasible for cable operators to unbundle their networks and allow multiple ISPs to provide their own independent data services to subscribers over cable facilities."<sup>121</sup>

- **Hasn't AT&T made these kinds of technical impossibility claims before?**

Yes. As the FCC has acknowledged, AT&T "refused to allow non-Bell equipment to be connected into its network, claiming that such equipment would undermine the integrity of the network."<sup>122</sup> The agency's pro-competitive equipment registration program long ago proved AT&T's claims groundless.

- **Has multiple ISP access already been proven to work over cable systems?**

Yes. GTE has successfully operated its cable system in Clearwater, Florida on an open access basis.<sup>123</sup> GTE made simple modifications to its cable modem platform that enabled three ISPs – AOL, CompuServe, and GTE.net – to share the cable broadband infrastructure and to obtain direct access to their customers.<sup>124</sup> And Mindspring also has reported success on an open access platform, describing its transport arrangement with a cable overbuilder as the "kind of transport arrangement [that] can be done on a non-exclusive basis . . . [and] serve as a model for an 'equal access' requirement for cable operators."<sup>125</sup>

- **Haven't Canadian officials already mandated multiple ISP access?**

Yes. The Canadian Radio-Television and Telecommunications Commission adopted open access as a viable, and vital, public policy. Using the same DOCSIS technical standards also used by cable systems in the United States, Canada now requires incumbent cable companies to provide third-party ISP access.<sup>126</sup>

- **Didn't AT&T explain to Canadian officials that third-party access was impossible?**

No. To the contrary, in comments filed before AT&T struck its deal with TCI, AT&T Canada urged Canadian regulators to "treat[] as pre-conditions to any relaxation of [applicable] rules" the "establishment of safeguards to ensure that broadband access services continue to remain available from the cable companies on a non-discriminatory and unbundled basis."<sup>127</sup>

- **In the face of all this evidence of technical feasibility, are AT&T and other cable operators still really arguing to the contrary?**



Not really. Time Warner has admitted that “the cable industry has [the] technical capability to offer open Internet access, but has other reasons for not doing so . . . . [T]here were business considerations for not doing so.”<sup>128</sup> AT&T said last year that “[t]here are actually few places that multiple service providers can realistically interface with the cable system . . . [But] the cable operator is required to make significant monetary investment.”<sup>129</sup> And, @Home Corporation’s own SEC filings disclose to investors that the prospect of @Home losing its exclusive deal with cable operators (after the current contracts expire) is a viable risk.<sup>130</sup>

- **So multiple ISP access *isn’t* technically impossible, it’s just expensive?**

It is feasible but it isn’t expensive. The modifications in GTE’s Clearwater trial used widely available equipment, cost less than one dollar per home passed (\$60,000 for 80,000 homes), and worked on both analog and digital cable systems and with all varieties of cable modems.<sup>131</sup> So open access is not only theoretically possible but also practical and effective – meaning that there is *no technical or economic justification* for closing off broadband cable systems to true ISP competition.

- **But wouldn’t any cost hurt cable operators?**

Not if unaffiliated ISPs reimburse cable operators for these costs, as proposed. *See FAQ #10.*

- **Doesn’t the cable industry point to additional costs and network complications in accommodating multiple ISPs?**

Cable interests have sought to characterize the problems inherent in increased traffic as problems caused by multiple ISP access.<sup>132</sup> Yet the complications identified will occur as network traffic grows, regardless of whether there is one ISP or many.<sup>133</sup> Notably, neither the network infrastructure nor the cable operator’s network management system suffers as a result of modifications to the network to provide ongoing support of multiple ISPs. Nor does the presence of multiple ISPs serving different customers simultaneously cause any degradation of service.<sup>134</sup> And it doesn’t require the cable operator to devote additional capacity to Internet access.

- **Why wouldn’t cable operators see growth in network traffic as a good thing – especially if it leads to a greater use of, and a quicker payoff on, broadband?**

That’s a good question. Such results would support AT&T’s stated goal of bringing “better service, better price, and more choices to customers,” thereby fulfilling “the promise of the Telecom Act.”<sup>135</sup>

- **So open access is technically feasible without any significant burden on cable operators?**

Yes – if cable systems open their networks now, “virtually no changes would need to be made to the network infrastructure itself.”<sup>136</sup> But if cable is allowed to complete a nationwide roll-out of broadband on a closed system basis, the need for subsequent retrofitting could pose a significant expense and an obstacle to remedy.

<b>12</b>	<b>ISN'T THE FCC LEGALLY BARRED FROM IMPOSING AN OPEN ACCESS CONDITION ON THIS MERGER AND THEREBY "COMMON CARRIERIZING" CABLE INTERNET ACCESS?</b> <i>Search Term: PUBLIC INTEREST</i>
-----------	---

- **Where does the FCC get the authority to impose an open access condition?**

Section 310(d) of the Communications Act. It grants the Commission broad power to impose reasonable, targeted conditions, as necessary to serve the public interest, where a proposed transfer would result in anti-competitive effects.<sup>137</sup>

- **Besides the general public interest goal, would an open access condition serve specific Commission rules or policies?**

Open access would achieve aims that lie at the core purpose and expertise of the Commission. Indeed, this condition would directly advance the Administration's long-standing principles for our national information infrastructure: private investment, competition, open access, universal service and flexible regulation.<sup>138</sup> More specifically, open access would serve to help achieve the clear goal set forth in Section 706 of the 1996 Telecom Act: "the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."<sup>139</sup> Section 1 of the Communications Act similarly seeks to "make available, so far as possible . . . a rapid, efficient Nation-wide, and world-wide wire and radio communication service."<sup>140</sup> Open access also serves the policy underlying a broad range of cable regulations mandating unbundling and nondiscrimination against unaffiliated content providers. Similarly, open access is consistent with the FCC's own Computer II unbundling requirements for Title II common carriage.

- **But those cable and telephony regulations don't specifically address cable Internet access, do they?**

The Commission and the courts have found forward-looking, preventive safeguards particularly appropriate in protecting the public interest from the "anti-competitive effects flowing from a merger which may not be addressed or remedied by the Commission's rules."<sup>141</sup>

In any event, the Chairman himself has made clear that the agency's regulatory authority here is not in question – which leaves open only whether to use it.<sup>142</sup>

- **Shouldn't these policy issues be dealt with in a rulemaking proceeding instead of a merger review?**

The Commission "may, in its discretion, choose to make new policy through either rulemaking or [an] adjudication" such as this merger proceeding.<sup>143</sup> In fact, consideration of the issue here is required because the agency cannot approve the transfer of control of MediaOne if it would be contrary to the public interest. This is true regardless of whether a remedial condition should also be applied to cable operators outside this merger. (Of course, this proceeding itself already involves the interests of nearly all of the leading MSOs, as well as both of the leading cable ISPs.)

- **Isn't open access barred by the Cable Act's prohibition on common carrier regulation of cable service?**

No. An open access policy – requiring cable operators to treat unaffiliated ISPs on a nondiscriminatory basis vis-a-vis its affiliated ISP – does not inherently mean common carrier regulation. In fact, existing Title VI requirements already include a series of nondiscrimination and unbundling requirements. These include Section 616 (carriage agreements) and Section 612 (leased access) of the Communications Act.<sup>144</sup> And nobody has found these provisions to violate the prohibition on common carrier regulation of cable service.

- **What about the impact of Section 624(f)(1), which bars regulators from imposing “unenumerated” requirements on cable service?**

The Supreme Court has found this provision to be limited to content restrictions.<sup>145</sup> The open access condition would not be a “viewpoint-specific” limitation but merely a structural regulation – and so it would not constitute a prohibited content restriction.<sup>146</sup>

- **So the Commission has the affirmative authority to impose an open access condition on AT&T?**

Right.

### **13 WOULDNT OPEN ACCESS REQUIRE COMPLEX MICROMANAGEMENT AND TECHNICAL REGULATION?**

*Search Term: JUST BREAK THE LOCK*

- **Wouldn't an open access obligation embroil the FCC and the industry in a detailed and burdensome regulatory regime governing – and stifling – cable's offering of Internet access?**

No.

- **So how would you avoid a complex regulatory regime?**

By using a simple nondiscrimination standard.

- **What would this look like?**

“A cable television system operator that provides any Internet service provider access to its broadband cable facilities shall provide a requesting ISP access to its facilities on rates, terms, and conditions not less favorable than those under which it provides access to its affiliate or to any other person.”

- **Wouldn't that approach require detailed FCC involvement in and control over rates and contract terms?**

No. We would rely on the marketplace to police this process.

- **What about additional implementing regulations?**

The FCC found no implementing regulations necessary when it addressed nondiscrimination against unaffiliated cable content providers under Section 616, the “carriage agreements” provision, which bars any MVPD “from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage . . . .”<sup>147</sup>

- **Hasn’t Section 616 required extensive FCC oversight of rates, terms, and conditions for MVPDs?**

No. The FCC has never been required to intervene and mandate specific rates, terms, and conditions under that section.

- **Well, what about program access – hasn’t that required the agency to engage in detailed rate and terms regulation?**

The program access provision does specifically contemplate the FCC addressing the rates, terms, and conditions of affiliation agreements, and the implementing regulations go into much more detail than we propose here. Even so, program access has resulted in only a handful of FCC rulings per year since the 1992 Cable Act. Only a few of these proceedings have called for the FCC to address specific rates and terms,<sup>148</sup> and in none of these proceedings did the FCC actually even set an agency-established rate. Despite these limited demands on FCC enforcement, program access is widely viewed as having had a substantial positive impact in breaking down exclusive carriage arrangements and spurring competition.

- **How effective would nondiscrimination regulation be in the Internet access context?**

If the FCC makes the fundamental decision that cable operators cannot exclusively self-deal with their affiliated ISP, the national spotlight and the ease of determining where cable is allowing third-party ISP access should make the provision largely self-enforcing.

- **How will parties know if a deal is nondiscriminatory?**

Independent ISPs will take the distribution rates, terms, and conditions offered to @Home.

- **What about technological compatibility issues?**

The cable operator should determine the technology to be used in making open access possible and then specify on a nondiscriminatory basis the technical requirements for any provider of Internet access service to interconnect with its cable modem platform.

- **Are you sure this is all that open access will require?**

We believe that, once a federal open access policy is in place, the marketplace will readily adapt to the open model and allow for the private resolution of disputes. Consumers will demand no less.

- **Doesn't open access still amount to "legacy regulation" of Internet services?**

Open access does not require imposing a panoply of legacy common carrier regulations to Internet access. Our answer is simply a modest nondiscrimination policy – which could provide the model for the deregulation of the telephony side of this equation.

- **But haven't some parties called for application of Title II common carrier regulation to cable access offerings?**

Some entities have urged this approach, but many have not. The FCC, as it noted in its brief in the Portland case, has not yet determined the regulatory classification of the last-mile transmission component of cable provided Internet access service. Anyway, imposing a limited open access condition as a part of this merger proceeding would not amount to imposition of a Title II regime – it doesn't even require the FCC to resolve the issue of regulatory classification of the service.

<b>14    WOULDN'T OPEN ACCESS MEAN THE GOVERNMENT IS SUDDENLY REGULATING THE INTERNET?</b>
--

*Search Term: NAME GAME*

- **Regulation of the Internet is widely recognized to be bad public policy, right?**

Right.

- **Hasn't openness and competition, not regulation, fueled the Internet's remarkable success?**

Right.

- **What has ensured the openness, competitiveness and consumer choice that characterize the Internet today?**

Access to the underlying infrastructure for ISPs and content providers.

- **What has guaranteed this access?**

FCC regulation.

- **Did you say regulation?**

Yes. As a group of policy analysts – including a former high-level FCC official – recently cautioned,

in a misreading of its own history the FCC may abandon its successful [open infrastructure] policy just as a new generation of services, spurred by mass-deployment of broadband Internet services, are defining the future of networking and the electronic economy. . . . [T]he FCC is now starting to confuse the instruments of its successful policy with the logic of its strategy. That strategy, again, was to *maintain openness by making key network components available to all, on cost-effective terms, so as to allow competition and innovation.* . . .

. . . While the FCC may believe [that] inaction simply constitutes its “unregulation” of the Internet, we should be clear that non-intervention constitutes instead a fundamental policy reversal. For thirty years the consistent FCC policy has been to foster competition, in particular cost-oriented access to essential local network facilities, and to promote an open network architecture. Far from non-intervention, this has required sustained policy intervention to keep the US communications infrastructure open.<sup>149</sup>

- **How does the FCC address the ability of unaffiliated ISPs to offer service over local telephone networks?**

The FCC requires ILECs to provide transport and interconnection for Internet access to any purchaser on a nondiscriminatory basis subject to Commission-designated pricing standards and additional ILEC obligations. And the Act’s nondiscrimination, interconnection and resale requirements are imposed on all carriers, not just ILECs.

- **So AT&T must object to this telephone framework as extensive regulation of the Internet?**

No. AT&T does not define *that* as regulating the Internet. According to AT&T, a framework of telecom rules is necessary in order for new entrants to compete effectively because “control of bottleneck facilities, and the high costs of duplicating those facilities” provide “substantial incentives to deny [ ] access in order to preserve market power.”<sup>150</sup>

- **Does the FCC consider the telco regime to be regulation of the Internet?**

No. In fact, Chairman Kennard recently characterized the telecommunications framework for Internet services as “deregulatory [and] pro-competitive.”<sup>151</sup> It was FCC regulation, he explained, that “allow[ed] anyone to connect a piece of equipment to the phone network as long as it would not harm the network” and that “cleared the way for the rapid development of a competitive market in and the rapid deployment of the modem – without which we would not have this robust Internet economy.”<sup>152</sup> He specifically cited regulations that make it “easier for competitors to co-locate their equipment in the RBOC central office” to “help competitive DSL providers.”<sup>153</sup> And Chairman Kennard is correct in saying that these regulations do not “regulate the Internet.”

- **But how does access regulation fit with the FCC's long-standing commitment to the "unregulation" of the Internet?**

In the FCC's own words, "[o]pen access across the telecommunications network has driven the deployment of innovative and inexpensive Internet access services."<sup>154</sup> Key to the growth of the Internet was the FCC-mandated ability of "phone customers . . . to access any Internet service provider of their choosing."<sup>155</sup>

- **So how can we distinguish what's "regulation" of the Internet and what's "unregulation" of the Internet?**

The FCC itself has already answered this. In its *MCI-WorldCom Order*, the Commission stated: "We seek not to regulate the Internet, but rather to ensure that Internet services which rely on telecommunications transmission capacity, remain competitive, accessible, and devoid of entry barriers."<sup>156</sup>

## **15 SO WHAT SHOULD POLICYMAKERS DO ABOUT THIS MERGER?**

*Search Term: WALK THE WALK*

- **Given this discussion, it's plain that the AT&T/MediaOne merger has vast implications for the development of new, integrated communications, right?**

Right. The AT&T/MediaOne combination would have unprecedented clout in all aspects of the communications field, including the hardware, the software, the speed and terms of deployment, and the emergence and viability of diverse content sources. That breadth of power is one that even the old Ma Bell didn't enjoy.

- **Is there an ultimate policy goal that should be guiding regulators as they grapple with the details of this enormous proposal?**

They need to do what it takes to make the "two-wire" vision that has been driving telecom policy for the last decade really happen. That means establishing a limited regulatory framework here that would ensure open access – and then stepping back and letting these facilities providers compete for customers on the basis of price and service options. Chairman Kennard has noted that the "openness and competition" everyone seeks requires "a FCC *vigilant* in its monitoring of anticompetitive behavior and bottlenecks."<sup>157</sup>

And AT&T itself has acknowledged the needed model: "An open platform is the best way to stimulate innovation in cable."<sup>158</sup> The company is right on the policy point – not simply with respect to innovative cable services but also for the stimulation of demand for, and development of, broadband technology and integrated voice/video/data communications services.

- **So AT&T already talks the talk?**

Yes – and now it's time to walk the walk. Openness should be fundamental to a world where, as AT&T put it, "the boundaries are erased between services and applications."<sup>159</sup> The FCC certainly has recognized that such openness is the bedrock of the Internet.<sup>160</sup>

- **In concrete terms, how does "walking the walk" translate into action here?**

Policymakers should ensure that any combined AT&T/TCI/MediaOne cannot use its extensive horizontal and vertical power in the marketplace either to shape how independent rivals challenge its affiliates or to suppress competition altogether. That means imposing a limited but straightforward open, nondiscriminatory access condition to afford nonaffiliated ISPs access to the broadband cable modem platform.

This condition will allow consumers an effective opportunity to reach independent Internet service and content providers as well as AT&T affiliates – and let marketplace forces do the rest.



## ENDNOTES

---

<sup>1</sup> See *Application for Consent to the Transfer of Control of Licenses from MediaOne Group, Inc. Transferor, to AT&T Corp., Transferee, Description of the Transaction, Public Interest Showing and Related Demonstrations*, (A description of the transaction and public interest showing was included as an appendix to the July 7, 1999 filing and is referenced hereinafter as “*AT&T/MediaOne Application*”). See also MediaOne Group 1998 Investor Handbook <[http://www.mediaonegroup.com/investorinfo/factbooks/98mediafactbook/investor\\_handbook\\_1998.pdf](http://www.mediaonegroup.com/investorinfo/factbooks/98mediafactbook/investor_handbook_1998.pdf)>.

<sup>2</sup> *Id.* at App. A.

<sup>3</sup> *Id.* at 5-17.

<sup>4</sup> David Lieberman, *AT&T Bargains For Cable System Swap*, USA Today, June 18, 1999 at B1 (quoting AT&T’s President for Broadband Services Leo J. Hindery, Jr.).

<sup>5</sup> *Id.*

<sup>6</sup> *AT&T/MediaOne Application* at 9, 12, 17.

<sup>7</sup> See *Cable’s Top 25 People’s Choice*, Broadcasting & Cable, Aug. 2, 1999 at 48.

<sup>8</sup> *Report of the Senate Committee on Commerce, Science and Transportation*, S. Rep. No. 102-92 (1991) (discussing the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385) (“Senate Report”).

<sup>9</sup> *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, 8 FCC Rcd 8565, 8579 (1993) (Second Report and Order) (“*Ownership Second Report and Order*”).

<sup>10</sup> See generally *The Battle For the Last Mile*, The Economist, at 59 (May 1, 1999); @Home Network Reports First Quarter Results, Press Release (Apr. 13, 1999).

<sup>11</sup> See Remarks by AT&T Chairman and CEO, C. Michael Armstrong, at the 1999 National Cable Television Association Convention, June 14, 1999 (“*NCTA Remarks by AT&T Chairman*”) <[http://www.att.com/speeches/99/990614\\_cma.html](http://www.att.com/speeches/99/990614_cma.html)> (visited Aug. 20, 1999) (emphasis added).

<sup>12</sup> *AT&T and Time Warner Form Strategic Relationship to Offer Cable Telephony*, News Release, February 1, 1999 <<http://www.att.com/press/item/0,1193,330,00.html>> (visited Aug. 20, 1999).

<sup>13</sup> See *NCTA Remarks by AT&T Chairman*, *supra*.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Ken Auletta, *How the AT&T Deal Will Help John Malone Get Into Your House*, The New Yorker, July 13, 1998, at 25 (emphasis added).

<sup>17</sup> *Application of WorldCom, Inc., and MCI Communications Corporation for Transfer of Control*, 13 FCC Rcd 18025, ¶142 (1998).

<sup>18</sup> *AT&T Household Reach to Be Issue in MediaOne Merger Review*, Communications Daily, May 10, 1999.

<sup>19</sup> See, e.g., Senate Report at 34 (testimony of John Malone, TCI Chairman, regarding need for cable horizontal ownership limits).

<sup>20</sup> *Amicus Curiae* Brief of the Federal Communications Commission, *AT&T Corp. v. City of Portland*, CV No. 99-35609 (9th Cir., filed Aug. 16, 1999) (“*FCC Amicus Curiae Brief*”).

<sup>21</sup> *Id.* at 19.

<sup>22</sup> *AT&T/MediaOne Application* at 1. Indeed, there is no obvious economic reason that AT&T has chosen to focus its analysis on local telephony. The Commission should recognize that these companies’ core competency

and profit center is not now, nor will it ever be, local residential telephone service.

<sup>23</sup> *AT&T/MediaOne Application* at 21, 27-28.

<sup>24</sup> *In the Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985, 20063 (1997) (Memorandum Opinion And Order) (“*BA/NYNEX Order*”).

<sup>25</sup> *See Pleading Cycle Established For Comments on Conditions Proposed by SBC Communications Inc. and Ameritech Corporation For Their Pending Applications to Transfer Control*, DA 99-1305, CC Docket No. 98-141 (rel. July 1, 1999) <[http://www.fcc.gov/Bureaus/Common\\_Carrier/Public\\_Notices/1999/da991305.html](http://www.fcc.gov/Bureaus/Common_Carrier/Public_Notices/1999/da991305.html)> (visited Aug. 20, 1999).

<sup>26</sup> *BA/NYNEX Order*, 12 FCC Rcd at 20063-64.

<sup>27</sup> *See Id.*; Department of Justice & Federal Trade Commission, *1992 Horizontal Merger Guidelines*, 1997 WL 166999 (Apr. 8, 1997).

<sup>28</sup> Comments of AT&T Corp. in *Application of GTE Corp., Transferor and Bell Atlantic Corp., Transferee, for Consent to Transfer of Control*, CC Docket No. 98-148, at 48 (Nov. 23, 1998) (emphasis added).

<sup>29</sup> Comments of AT&T Corp. in *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corp., Transferor to SBC Communications, Inc., Transferee*, CC Docket No. 98-141, at 35 (Sept. 15, 1998) (“*SBC/Ameritech Merger*”).

<sup>30</sup> *Id.* at 46.

<sup>31</sup> Bill Menezes, *MediaOne Sets DOCSIS Retail Strategy*, Multichannel Online News, June 14, 1999 <<http://www.multichannel.com>> (visited Aug. 20, 1999).

<sup>32</sup> Greg Braden, *Telephone Service is Fulfilling the Promise of Broadband*, Multichannel Online News, June 22, 1998 <<http://www.multichannel.com>> (visited Aug. 20, 1999).

<sup>33</sup> Mike Farrell, *Boston Hot for Telco Competition*, Multichannel Online News, Mar. 8, 1999.

<sup>34</sup> 1998 MediaOne Investor Handbook at 18.

<sup>35</sup> *Id.*

<sup>36</sup> *AT&T/MediaOne Application* at 15.

<sup>37</sup> *Id.* at 24, 31.

<sup>38</sup> *Id.* at 27-28.

<sup>39</sup> *AT&T in SBC/Ameritech Merger* at 38, 43.

<sup>40</sup> *AT&T/MediaOne Application* at 70.

<sup>41</sup> MediaOne Annual Report at 17.

<sup>42</sup> *AT&T/MediaOne Application* at 4, 30, 42.

<sup>43</sup> MediaOne Investor Handbook at 9.

<sup>44</sup> *AT&T/MediaOne Application* at 29-30.

<sup>45</sup> H.R. Rep. No. 102-628, at 43 (1992) (“H.R. Rep. No. 102-628”).

<sup>46</sup> *Ownership Second Report and Order*, 8 FCC Rcd at 8570-71. *See also* H.R. Rep. No. 102-628, at 40 (“Both Congress and the Commission have historically recognized that diversity of information sources can only be assured by imposing limits on the ownership of media outlets that are substantially below those that a traditional antitrust analysis would support.”).

<sup>47</sup> Jane Weaver, *TV? PC? How Do You Get Your Web?*, ZDNN, Aug. 2, 1999 <<http://www.zdnet.com/zdnn/stories/news/0,4586,2307752,00.html>> (visited Aug. 20, 1999).

- <sup>48</sup> Richard Tedesco, *Video Streaming, The Not Ready for Prime Time Medium*, Broadcasting and Cable Online (posted May 22, 1998) <<http://www.broadcastingcable.com>>.
- <sup>49</sup> Michael Stroud, *End of TV as We Know It?*, Wired News, <<http://www.wired.com/news/news/culture/story/21054.html>> (visited Aug. 20, 1999) (quoting Snap.com COO Edmund Sanctis).
- <sup>50</sup> Richard Tedesco, *Video Streaming, The Not Ready for Prime Time Medium*, Broadcasting and Cable Online (posted May 22, 1998) <<http://www.broadcastingcable.com>>.
- <sup>51</sup> *Id.*
- <sup>52</sup> Richard Tedesco, *Start-ups Gathering Streams, New Video Services Compete To Establish Their Own Niches on the Internet*, Broadcasting and Cable Online (posted Apr. 30, 1999) <<http://www.broadcastingcable.com>>.
- <sup>53</sup> Richard Tedesco, *Who'll Control the Video Streams? More and More Players Are Muscling Into Position to Dominate Video on the Web*, Broadcasting and Cable Online (posted Mar. 5, 1999) <<http://www.broadcastingcable.com>>.
- <sup>54</sup> *PC-TV Convergence Driving Streaming Industry Growth*, Warren's Cable Regulation Monitor, Vol. 7, Issue 9 (Mar. 1, 1999) ("PC-TV Convergence").
- <sup>55</sup> See, e.g., *Prospectus/Proxy Statement of @Home Network*, at 144 (Apr. 27, 1999); *PC-TV Convergence*, *supra*.
- <sup>56</sup> See Corey Grice, *@Home Suffering Cracks in the Foundation?*, CNET News.com, January 26, 1999 <<http://www.news.com/News/Item/0,4,31414,00.html>>.
- <sup>57</sup> See *Testimony of AT&T Chairman and CEO, C. Michael Armstrong*, Before the Senate Judiciary Committee, July 14, 1999 ("Senate Testimony of AT&T Chairman"); see also *PC-TV Convergence*, *supra*.
- <sup>58</sup> *Senate Testimony of AT&T Chairman*.
- <sup>59</sup> *Id.*
- <sup>60</sup> Richard Tedesco, *Who'll Control the Video Streams? More and More Players Are Muscling Into Position to Dominate Video on the Web*, Broadcasting and Cable Online (posted Mar. 5, 1999) <<http://www.broadcastingcable.com>>.
- <sup>61</sup> *Id.*
- <sup>62</sup> *Id.*
- <sup>63</sup> *Telecom Mergers: En Banc Hearing on Telecom Mergers To Discuss Recent Consolidation Activities in the Telecommunications Industry, Focusing on Three of the Proposed Mergers Before the Federal Communications Commission* (Oct. 22, 1998) ("Telecom Mergers: En Banc Hearing").
- <sup>64</sup> See *Letter from Center for Media Education, Consumer Federation of America, Consumers Union, Media Access Project, and OMB Watch*, to Chairman William Kennard, at 2 (July 29, 1999) (emphasis added).
- <sup>65</sup> See John Markoff, *Microsoft Hunts Its Whale, The Digital Set-Top Box*, N.Y. Times (May 10, 1999) <<http://www.nytimes.com/library/tech/99/05/biztech/articles/10box.html>>.
- <sup>66</sup> AT&T Corp., *Factbook: AT&T's Business*, available at <[http://www.att.com/factbook/co\\_business.html](http://www.att.com/factbook/co_business.html)> (Listed Aug. 20, 1999).
- <sup>67</sup> *Id.* at 8.
- <sup>68</sup> See *Comments of the National Cable Television Association*, CS Docket No. 97-80 (May 16, 1997).
- <sup>69</sup> *Navigation Devices Order*, 13 FCC Rcd 14775, 14820 (1998).
- <sup>70</sup> *Id.* at 14843 (Separate Statement of Chairman William Kennard).
- <sup>71</sup> See *NCTA Remarks by AT&T Chairman*, *supra*.

- <sup>72</sup> See General Instrument Corp. SEC Form SEC Form 10Q, at 13 (filed Aug. 13, 1999).
- <sup>73</sup> John Markoff, *Microsoft Hunts Its Whale, the Digital Set-Top Box*, N.Y. Times, May 10, 1999, <<http://www.nytimes.com/library/tech/99/05/biztech/articles/10box.html>> (Aug. 10, 1999) (quoting Microsoft chief financial officer, Greg Maffei).
- <sup>74</sup> *Id.*
- <sup>75</sup> *AT&T/MediaOne Application* at 9.
- <sup>76</sup> *Id.* at 12.
- <sup>77</sup> *In the Matter of Time Warner*, FTC File No. 961-0004 (Aug. 16, 1996).
- <sup>78</sup> Separate Statement of Chairman Pitofsky, and Commissioners Steiger and Varney, *In the Matter of Time Warner Inc.*, FTC File No. 961-0004 (rel. Aug. 28, 1998) <<http://www.ftc.gov/os/1996/9609/twother.htm>> (Aug. 20, 1999).
- <sup>79</sup> Scott Cleland and Bill Whyman, "How Regulatory Divergence May skew Value of Internet E-Commerce Companies, Legg Mason Precursor Research, April 12, 1999.
- <sup>80</sup> Letter from Center for Media Education, Consumer Federation of America, Consumers Union, Media Access Project, and OMB Watch to Federal Communications Commission Chairman, William Kennard, at 1 (July 29, 1999) ("Letter from Center for Media Education").
- <sup>81</sup> *Id.* at 1-3.
- <sup>82</sup> Ben Heskett, *Cisco drawn into Net control battle*, CNET News.com, July 30, 1999 <<http://www.news.com/News/Item/0%2C4%2C39979%2C00.html?sas.mail>> (Aug. 20, 1999).
- <sup>83</sup> 'Open access' advocates use Cisco lit as ammo, CNET News.com, July 29, 1999, <<http://www.news.com/News/Item/0%2C4%2C39939%2C00.html?sas.mail>> (Aug. 20, 1999).
- <sup>84</sup> See April 27, 1999 Prospectus of @Home Network at p. 147 (regarding the merger between @Home and Excite, Inc.).
- <sup>85</sup> Testimony of William Kennard Before the Senate Judiciary Subcommittee on Antitrust, Business Rights (Mar. 4, 1998).
- <sup>86</sup> See Letter from Center for Media Education, at 4.
- <sup>87</sup> See *In the Matter of Time Warner Inc.*, FTC File No. 961-0004 (rel. Aug. 28, 1998) <<http://www.ftc.gov/os/1996/9609/twother.htm>> (visited Aug. 20, 1999).
- <sup>88</sup> Separate Statement of Chairman Pitofsky, and Commissioners Steiger and Varney.
- <sup>89</sup> See Letter from Center for Media Education, at 1, 3.
- <sup>90</sup> *Id.* at 3.
- <sup>91</sup> *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24284, 24287 (1998) (Fifth Annual Report) ("Status of Competition").
- <sup>92</sup> *Id.* at 24287-88.
- <sup>93</sup> Vinton G. Cerf, *Don't Give AT&T a New Monopoly*, Wall Street Journal, July 27, 1999.
- <sup>94</sup> *Telecom Mergers: En Banc Hearing* (testimony of AT&T Broadband Services President Leo Hindery).
- <sup>95</sup> *Id.* (quoting AT&T Chairman and CEO).
- <sup>96</sup> *Id.* (quoting AT&T Chairman and CEO).
- <sup>97</sup> Letter from Betsy J. Brady, Federal Government Affairs and Vice President, AT&T, to Dr. Robert Pepper, Chief, Office of Plans and Policy, Federal Communications Commission (Jan. 7, 1999).
- <sup>98</sup> *Id.*

99        *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, 14 FCC Rcd 3160, 3207 (1999) (“AT&T/TCI Order”).

100        *See FCC Amicus Curiae Brief at 14, AT&T v. Portland*, No. 99-35609, filed Aug. 16, 1999 (9<sup>th</sup> Cir.).

101        *Telecom Mergers: En Banc Hearing*, at 32.

102        *Id.* at 33.

103        *Id.*

104        Saul Hansell, *The Battle for Internet Supremacy is Shifting to the Companies That Sell the Connections to Users*, New York Times, June 29, 1998, at D4 (emphasis added).

105        *Id.*

106        Opposition to Appellees’ Motion for Reconsideration Of Order Expediting This Appeal, Brief of AT&T, AT&T Corp. v. City of Portland, DC No. CV-99-00065-OMP (9<sup>th</sup> Cir., filed June 30, 1999).

107        *Id.* at 9.

108        *See ADSL Forum, ADSL Forum Public Area* <[http://www.adsl.com/adsl\\_forum.html](http://www.adsl.com/adsl_forum.html)> (visited Aug. 20, 1999).

109        Based on a study by Forrester Research, cable modem access will be the predominant high-speed Internet access mechanism for at least the next five years. Cable modems will have 700,000 users and DSL 25,000 users by the end of 1998. By the year 2000, 4.3 million consumers are projected to use cable modems, with only 400,000 users projected to use DSL. Forrester Research Inc., *Broadband Hits Home* at 5 (Aug. 1998) (attached as Exhibit A to Comments of BellSouth Corporation, CC Docket No. 98-146 (filed September 14, 1998). See also Kevin Maney, *Net Access: Cable Modems Surge*, USA Today, Oct. 5, 1998, at 1B.

110        *See generally The Battle For the Last Mile*, The Economist, at 59 (May 1, 1999); @Home Network Reports First Quarter Results, Press Release (Apr. 13, 1999).

111        *Id.*

112        *See Testimony of James W. Cicconi of AT&T, before the FCC Merger En Banc*, Dec. 14, 1998 (“Cicconi Testimony”); AT&T/MediaOne Application at 1, 4, and 20; Similarly, AT&T has consistently focused the TCI merger discussion on telephony. *See Cicconi Testimony* (“Local telephone service, again, [is] what this [merger] is all about.”).

113        *See AT&T and TCI See \$3.4 Billion in Revenue Growth From Merger*, Communications Daily, June 29, 1998.

114        AT&T/TCI Order, 14 FCC Rcd at 3230-31.

115        AT&T/MediaOne Application at 20.

116        *See Cable Competition and Rates Subject of Two Upcoming FCC Reports*, Communications Daily, Nov. 30, 1998, at 4.

117        MediaOne Investor Handbook at 11.

118        Christopher Mines & Emily Nagle Green, Forrester Research, Vol. V, No. 22 (Feb. 1, 1999).

119        *Telecom Mergers En Banc Hearing*, at 28.

120        AT&T Reply Comments in CC Docket No. 98-147, at 17.

121        *The Internet Freedom Act and The Internet Growth and Development Act of 1999, Hearings on H.R. 1685 and H.R. 1686 Before the House Comm. on the Judiciary*, June 30, 1999 (Statement of Tim Boggs, Senior Vice President for Public Policy at Time Warner, Inc.).

122        Telecommunications Research and Action Center, *Tele-Consumers and the Future: A Manual on the AT&T Divestiture* (1983) at 2-2 (citing *Use Of The Carterfone Device In Message Toll Telephone Service*; Thomas

*F. Carter And Carter Electronics Corp., Dallas, Tex., v. American Telephone And Telegraph Co., Associated Bell System Companies, Southwestern Bell Telephone Co., And General Telephone Co. Of The Southwest*, 13 FCC 2d 420, 424-425, *aff'd*, 14 FCC 2d 571 (1968)).

<sup>123</sup> GTE News Release, *GTE Demonstrates Ease Of Cable Open Access to Multiple ISPs; Clearwater Trial Shows One-Time Investment of Less Than \$1 Per Home Would Provide Consumer Choice*, June 14, 1999 <<http://www.gte.com/AboutGTE/NewsCenter/News/Releases/ClearwaterOpenAccess.html>> (visited Aug. 20, 1999).

<sup>124</sup> *Id.*

<sup>125</sup> Comments of Mindspring Enterprises, Inc., *In the Matter of AT&T Corporation and Tele-Communications, Inc., Application for Transfer of Control of Cable Licenses under Section 310(d) of the Communications Act of 1934*, CS Docket 98-178, at 18-19 (filed Oct. 29, 1998).

<sup>126</sup> *Regulation Under the Telecommunications Act of Certain Telecommunications Services Offered by Broadcast Carriers*, CRTC 98-9 (July 9, 1998).

<sup>127</sup> Comments of AT&T Canada Long Distance Services Company, *Regulation Under the Telecommunications Act of Certain Telecommunications Services Offered by Broadcast Carriers*, CRTC 98-9, p. ii (filed Feb. 4, 1998).

<sup>128</sup> Capitol Hill, *Communications Daily*, Vol. 19, Issue 122 (June 25, 1999).

<sup>129</sup> Affidavit of Milo Medin, *Joint Application of AT&T Corp. and Telecommunications, Inc. for Transfer of Control to AT&T of Licenses and Authorization held By TCI and Its Affiliates or Subsidiaries*, CS Docket 98-178 (Nov. 12, 1998).

<sup>130</sup> *See, e.g., At Home Corp., 1998 SEC Form 10K*, at 18.

<sup>131</sup> GTE News Release, *GTE Demonstrates Ease Of Cable Open Access to Multiple ISPs; Clearwater Trial Shows One-Time Investment of Less Than \$1 Per Home Would Provide Consumer Choice*, June 14, 1999 <<http://www.gte.com/AboutGTE/NewsCenter/News/Releases/ClearwaterOpenAccess.html>> (visited Aug. 20, 1999).

<sup>132</sup> *See* Affidavit of Milo Medin, *AT&T/TCI Application* at 1-4.

<sup>133</sup> *Ex parte* of GTE, C.S. Docket No. 98-178, at 7-8 (filed Feb. 2, 1999) (Declaration of Justin A. Aborn).

<sup>134</sup> As engineer Aborn explained, "the shared nature of the cable system exposes users to degraded service caused by an 'ill-behaved modem or user' ... but [such degradation] is unrelated to the number of interconnecting ISPs." *Ex parte* of GTE, C.S. Docket No. 98-178, at 7 (filed Feb. 2, 1999).

<sup>135</sup> *The Internet Freedom Act and The Internet Growth and Development Act of 1999, Hearings on H.R. 1685 and H.R. 1686 Before the House Comm. on the Judiciary*, June 30, 1999 (Statement of AT&T Vice President for Law Mark Rosenblum).

<sup>136</sup> Declaration of Justin A. Aborn, GTE *ex parte* submission, C.S. Docket No. 98-178, at 4 (filed Feb. 2, 1999).

<sup>137</sup> *See, e.g., In re GTE Corp. and Southern Pacific Co.*, 94 FCC 2d 235 (1983).

<sup>138</sup> The White House, *A Framework for Global Electronic Commerce*, July 1, 1997, at 1.

<sup>139</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 153 (1996). The Commission also has broad authority under Section 4(i) and (j), its so-called "necessary and proper" clause to impose such conditions.

<sup>140</sup> 47 U.S.C. § 151 (West Supp. 1999).

<sup>141</sup> *Telecommunications, Inc. and Liberty Media Corp.*, 9 FCC Rcd 4783, 4785 (1994).

<sup>142</sup> *Kennard Claims Jurisdiction Over Cable Unbundling*, *Communications Daily*, Vol. 19; Issue 97 (May 20, 1999) (at a Capitol Hill seminar, the Chairman stated that the Commission has jurisdiction over the issue of unbundling of cable Internet service.).

<sup>143</sup> *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir.), cert. denied, *Galaxy Communications, Inc. v. FCC*, 506 U.S. 816 (1992).

<sup>144</sup> 47 U.S.C. §§ 532, 536 (West Supp. 1999).

<sup>145</sup> See e.g. *United Video Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989).

<sup>146</sup> *Id.*

<sup>147</sup> 47 U.S.C. § 536(a)(3) (West Supp. 1999).

<sup>148</sup> *Turner Vision, Inc. v. Cable News Network, Inc.*, Memorandum Opinion and Order, 12 CR 1051, 1998 FCC Lexis 3198 (June 30, 1998); *Corporate Media Partners d/b/a Americast v. Rainbow Programming Holdings, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 15209 (Sept. 23, 1997); *Cross Country Cable, Inc. v. C-TEC Cable Systems of Michigan, Inc.*, Memorandum Opinion and Order, 1997 FCC Lexis 1222 (Mar. 5, 1997); *American Cable Company and Jay Copeland v. Telecable of Columbus, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 10090 (Aug. 29, 1996).

<sup>149</sup> Francois Bar, Stephen Cohen, Peter Cowhey, Brad DeLong, Michael Kleeman & John Zysman, "Defending the Internet Revolution in the Broadband Era: When Doing Nothing Is Doing Harm," E-economy Working Paper 12, Berkeley Roundtable on the International Economy, August 1999 (emphasis added and internal citations omitted).

<sup>150</sup> *Petition of AT&T Corp. to Deny Application in GTE Corp. and Bell Atlantic Corp.*, CC Docket No. 98-184, at 12 (filed Nov. 23, 1998). AT&T Canada extended this argument to cable operators specifically, stating that "[b]roadcast carriers [i.e., cable operators] have the ability to exercise significant market power through the control which they exercise over bottleneck broadband access facilities and through the dominance which they enjoy in their respective core business markets (e.g., cable [video] services in the case of cable broadcast carriers and local telephony services in the case of telecom broadcast carriers). . . . If the bottleneck nature of these services is not recognized, the establishment of a competitive market may be jeopardized, and more significantly, undermine the development of [the] Information Highway, contrary to the Federal Government's stated policy objective to create a network of interconnecting networks. . . . [B]roadcast carriers must allow competitors to access their broadband distribution network in the most efficient manner possible." See Comments of AT&T Canada Long Distance Services, *Regulation of Certain Telecommunications Services Offered by Broadcast Carriers*, CRTC 96-36, at i, 2, 25 (Feb. 4, 1997). The words are equally applicable south of the Canadian border.

<sup>151</sup> *Remarks by FCC Chairman William E. Kennard Before the Federal Communications Bar*, Northern California Chapter, San Francisco, CA (July 20, 1999) (As Prepared for Delivery), available at <<http://www.fcc.gov/commissioners/kennard/speeches.html>>.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Jason Oxman, "The FCC and the Unregulation of the Internet," FCC Office of Plans and Policy Working Paper No. 31 July 1999, at 5 ("Unregulation of the Internet").

<sup>155</sup> *Unregulation of the Internet*, at 5.

<sup>156</sup> *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, FCC 98-225, ¶ 142 (rel. Sept. 14, 1998).

<sup>157</sup> *Unregulation of the Internet* (emphasis added).

<sup>158</sup> See NCTA Remarks by AT&T Chairman.

<sup>159</sup> *Id.*

<sup>160</sup> *Unregulation of the Internet*, at 5.